Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1055

FAIRCHILD INDUSTRIES, INC.,

Petitioner,

v.

HONORABLE ALEXANDER HARVEY, II,
UNITED STATES DISTRICT JUDGE
(UNITED STATES OF AMERICA,
REAL PARTY IN INTEREST),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Published Procedures

Other Authorities

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Petitioner Fairchild Industries, Inc. (Fairchild) prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*) is reported at 581 F.2d 1103. No memorandum opinion of the District Court was issued. The reporter's transcript of proceedings of the District Court on May 30, 1978 (App. C, *infra*) contains the District Court's oral opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1978. The time for filing of this petition was

extended until December 31, 1978 by order of Chief Justice Burger entered on October 19, 1978 "without prejudice to the Court's consideration of whether this application has been filed on time." Fairchild submits that the applicable period for filing in this case is the 90 days prescribed by 28 U.S.C. § 2101(c) for civil cases. The judgment of the Court of Appeals sought to be reviewed by this Petition was a decision on the merits in a mandamus proceeding which is a civil action. 9 Moore's Federal Practice ¶¶ 204.08[1], 204.15.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Internal Revenue Service directives requiring top level policy making IRS officials to receive grand jury information, and to supervise and control the activities of IRS agents assigned to assist grand jury investigations, constitute a substantial showing that IRS, as an institution, is effectively running grand jury investigations in violation of the integrity of the grand jury process and Rule 6(e) of the Federal Rules of Criminal Procedure, making an evidentiary hearing mandatory?

2. Whether IRS directives requiring IRS officials to utilize grand jury information to identify evidence useful for IRS civil purposes, and to request the prosecutor to seek an order freeing such evidence from grand jury secrecy, constitute a substantial showing that IRS is exploiting grand jury investigations for civil purposes in violation of Rule 6(e) making an evidentiary hearing mandatory?

3. Whether such IRS grand jury directives violate this Court's ruling in *United States v. La Salle National Bank,* 98 S. Ct. 2357 (1978), prohibiting IRS institutional participation in grand jury investigations?

4. Whether attorneys employed by the IRS with substantial prior agency involvement in a tax matter should be permitted to assist a grand jury investigation of the same matter?

STATUTES INVOLVED

This case involves the following statutes and rules of procedure which are reprinted as Appendix A, *infra.*

(1) Federal Rule of Criminal Procedure 6(e).

(2) 28 U.S.C. § 1651.

(3) Internal Revenue Manual Supplement 9G-85.

STATEMENT OF THE CASE

On May 19, 1977, the Intelligence Division of the Internal Revenue Service commenced an investigation of Fairchild's tax returns for the years 1971 through 1975. At that point, IRS civil audits of Fairchild's tax returns for 1971 and 1972 (as well as 1965 through 1970) had been completed and the civil audit of the company's tax returns for 1973 through 1975 was ongoing.[1] This investigation was thereafter conducted as a "joint

[1] (a) 1965-68 Audit and Appeal.

In approximately February, 1970, the Audit Division of the IRS commenced an audit of Fairchild's 1965 through 1968 tax returns which resulted in an Examination Report dated November 30, 1972 and a "30-day letter" (a form transmittal letter) dated February 27, 1973 from which Fairchild appealed to the Appellate Division by a "protest" on or about June 12, 1973. This matter stayed within the jurisdiction of the Appellate Division until October, 1977, when it was returned to the Audit Division.

(b) 1969-1970 Audit and Appeal

In approximately July, 1972, the Audit Division commenced an audit of Fairchild's 1969 and 1970 tax returns which resulted in an Examination Report dated March 28, 1973 and a "30-day letter" dated July 25, 1973, from which Fairchild appealed to the Appellate Division by a "protest" on or about October 26, 1973. This matter stayed within the

investigation," i.e., one with both civil and criminal purposes, with both Internal Revenue Agents (civil) and Special Agents (criminal) working on it.

Subsequently, the IRS issued during the course of the investigation approximately sixty (60) administrative summonses pursuant to 26 U.S.C. § 7602 to gather documents and obtain testimony of witnesses. To the knowledge of Fairchild, except for one matter, described below, there has been no failure to respond to any summons requiring enforcement action. Moreover, in all cases where it has received notice of "third party" summonses, Fairchild has not exercised its right to stay compliance of such summonses. As a result, from June, 1977 to date the IRS investigators have obtained and reviewed tens of thousands of Fairchild's records and have received the testimony of dozens of witnesses.

During the course of this investigation, Fairchild declined to comply with certain summonses commanding production of records relating to the 1965 through

jurisdiction of the Appellate Division until October, 1977, when it was returned to the Audit Division.

(c) 1971-1972 Audit and Appeal

In approximately November 1973, the Audit Division commenced an audit of Fairchild's 1971 and 1972 tax returns which resulted in an Examination Report dated April 17, 1975 and a "30-day letter" dated June 19, 1975, from which Fairchild appealed to the Appellate Division by a "protest" in late 1975. This matter stayed within the jurisdiction of the Appellate Division until October 14, 1977, when it was returned to the Audit Division.

(d) The Presently Ongoing 1973-1975 Civil Audit

In approximately June, 1976, the Audit Division commenced an audit of Fairchild's income tax returns for the years 1973 through 1975. This audit was actively conducted with the full cooperation of Fairchild and is presently pending in the administrative process. Moreover, Fairchild believes that the government will admit that at least one of the civil Internal Revenue Agents who had been most actively working on the 1972-1975 civil audit is functioning as an agent of the grand jury presumably with respect to the same tax returns he was investigating in the civil audit.

1972 taxable years. The principal ground for objection was that there had been one completed examination of these years (see description of the Fairchild's audits, *supra*) and that the law required, prior to a reexamination of the books and records of Fairchild for those years, that the Secretary of the Treasury or his delegate determine that a second examination was necessary and issue the standard form "second examination letter" 28 U.S.C. § 7605(b).

The earliest compliance date for the summonses as to which the second examination objection was made was September, 1977. A total of some twelve or more summonses was involved. Rather than request the District Director to make the determination, issue the letter, and avoid delay in getting the documents, the IRS decided to proceed with litigation to test the correctness of Fairchild's position. Summons enforcement actions on three of the summonses concerned were commenced. *United States v. Fairchild Industries, Inc.*, (Civil Action Nos. M-77-1875-1877) (D. Md. 1978). Ultimately, on February 28, 1978, the Honorable James R. Miller, Jr. ruled that Fairchild's objections were valid and that the summonses at issue could not be enforced (with respect to 1972 and earlier) by virtue of the absence of a second examination notice. Judge Miller noted in his oral opinion, at 3-4:

> The arguments which have been adduced here . . . might be and may well be very ligitimate reasons why the District Director would be persuaded, upon application to him, to issue the approval required by Section 7605(b) . . .

The IRS not only refused to issue the second examination notice when the first objection was raised (so as to eliminate the issue altogether), but subsequently declined to issue such a notice. Hence, by virtue of its own decision (which Fairchild submits may well have been influenced heavily by its desire to justify the

utilization of a grand jury in its investigation) the IRS denied itself access to Fairchild's summoned 1971-1972 records for several months prior to the decision of Judge Miller. Several weeks after this decision, the same IRS agents served (on April 12, 1978) grand jury subpoenas on Fairchild for substantially the same records in their new capacity as "agents of the grand jury."[2]

It is most significant that the Special Agents conducting the IRS investigation have been appointed as assistants to the attorney for the government conducting the grand jury investigation.[3] Indeed all subpoenas served on Fairchild to date have been served by some of these Special Agents who at times have used the designation "Special Agent" on the return of service. Moreover, one of the IRS employees now serving as an agent of the grand jury is a Revenue Agent who not only assisted in the civil audit of Fairchild's 1973, 1974 and 1975 tax returns, but was also a member of the IRS joint investigation team.[4] These agents are currently receiving grand jury subpoenaed documents and reviewing them ostensibly in their role of assisting the grand jury.[5]

[2] The Government has recently stated, since the decision of the Fourth Circuit, that IRS referred this case to the Department of Justice for grand jury investigation on March 9, 1978, "during the course" of the summons enforcement proceedings before Judge Miller. Government's Memorandum in Opposition to Motion to Dismiss the Indictment, p.4 (United States District Court for the District of Maryland, Criminal No. M-78-0384).

[3] Special Agents Howard Rosenstein, Donald Semesky, Stanley Young and Jules R. Dorner. Mr. Dorner is an attorney admitted to practice in the State of Maryland. *See 1978 Maryland Lawyer's Manual,* 159.

[4] Henry G. Sautter. Mr. Sautter is an attorney admitted to practice in the State of Maryland. *See III Martindale-Hubbell Law Directory,* 473 (1978).

[5] It is also significant that the Chief of the Intelligence Division is receiving grand jury reports from the Revenue Agent assigned to the grand jury investigation. During oral argument before the Fourth Circuit the Government admitted this disclosure of grand jury information in response to a question from Judge Winter. On the basis of the recently published (October, 1978) provisions of Internal Revenue Manual Supplement 9G-85 (App. A(3), *infra*) it can now reasonably be assumed that grand jury information is being disseminated among a wide number of high level IRS officials for the purpose of permitting the IRS to supervise and control the grand jury investigation.

As noted above, the question of Fairchild's civil tax liabilities for the years 1965-1972 was pending in the Audit Division, which was simulanteously conducting a joint investigation of Fairchild with the Intelligence Division for the years 1971-1975.

On December 29, 1977, the IRS issued a statutory notice of deficiency to Fairchild with respect to the years 1965-1972.[6] The notice of deficiency proposed assessments of deficiencies in tax totaling $24,580,426 plus civil fraud penalties totaling $14,435,620, for a total in issue of $39,016,046 plus interest.[7]

There is pending, therefore, in the United States Tax Court a substantial civil tax case including issues which overlap considerably with the subject matter of the IRS investigation and the current grand jury investigation. In this regard, it is essential to note briefly at this point that the rules governing Tax Court

[6] All agree there is no tax liability whatsoever for 1968. However, the year 1968 is effectively in issue. Hence, it is appropriate to refer to the Tax Court case as involving all of 1965-1972, inclusive.

[7] In view of the nature of the civil tax case and the possibly misleading nature of a cursory reference to the amounts at issue, it should be noted that the civil fraud penalty applies to the entire tax deficiency for a given year and not just the deficiency resulting from adjustments due to fraud. 26 U.S.C. § 6653(b). In the Fairchild Tax Court case the pleadings reveal that a fraction of 1% of the matters in issue pertain to alleged fraud items. The bulk of the case involves technical, accounting and other normal tax issues.

litigation differ considerably from those governing civil litigation in the United States District Court and, *a fortiori,* those governing grand jury proceedings. Thus, in Tax Court litigation there can be no discovery depositions;[8] there is third party discovery only in extremely limited circumstances (not here pertinent);[9] and discovery from parties is subject to procedural and substantive requirements.[10] Hence, neither party would, in the course of its civil litigation, have available the ability to utilize discovery tools comparable to those available to the government alone in the course of a grand jury investigation.[11]

On or about April 28, 1978, the return date of the grand jury subpoenas served on April 12, 1978, Fairchild filed a Motion to Quash Grand Jury Subpoenas, Terminate Grand Jury Proceedings and for Protective Orders in the United States District Court for the District of Maryland. Accompanying this motion were motions for an evidentiary hearing and for production of documents relating to the initiation of the grand jury proceedings. Fairchild further requested the Court to stay compliance with all of the subpoenas issued in connection with the investigation of Fairchild pending resolution of the motion to quash.

On May 4, 1978, the district court entered an order staying compliance with the eight subpoenas originally served on Fairchild on April 12, 1978. No stay was granted with respect to the third party subpoenas subsequently issued. However, by agreement between counsel, the May 4th order staying compliance by Fairchild was extended to apply to all subpoenas

[8] Rule 70(a), Tax Court Rules.

[9] E.g., Rule 73, Tax Court Rules.

[10] Rule 70, Tax Court Rules.

[11] For a discussion of discovery proceedings in the United States Tax Court, *see* M. Garbis & A. Schwait, *Tax Court Practice,* Chapter 5 (1974 & Cum. Supp. 1977).

subsequently served on Fairchild, pending resolution of the motion to quash.

An *in camera* hearing[12] on Fairchild's motions was held before the Honorable Alexander Harvey, II, on May 26, 1978; and the Court rendered an oral opinion on May 30, 1978 (App. C, *infra*) denying these motions. At the conclusion of the reading of the Court's opinion, counsel for Fairchild made oral motions for an order permitting an appeal under 28 U.S.C. § 1292(b) and for a further stay of compliance pending appeal.

On May 31, 1978, Judge Harvey entered a formal order (App. D, *infra*) summarily denying all of Fairchild's motions, including the oral motions made on May 30, 1978.[13] Fairchild filed a timely Notice of Appeal to the Fourth Circuit on June 2, 1978.

Simultaneously with the filing of the Notice of Appeal, Fairchild filed a Petition for Writ of Mandamus under the All Writs Act, 28 U.S.C. § 1651, with the Fourth Circuit. Fairchild also applied to the Honorable Harrison L. Winter, United States Circuit Judge, on June 2, 1978, for an order staying compliance with respect to any and all subpoenas theretofore issued or to

[12] During this hearing Fairchild was denied any opportunity to learn under what IRS-Department of Justice procedures the grand jury investigation was initiated. Fairchild claimed that earlier IRS procedures which might still be operative in this case revealed a history of abuse of grand jury investigations by the IRS. The government denied any abuse in conclusory terms and the District Court refused to hold an evidentiary hearing to learn whether the IRS was in fact exploiting the grand jury for its own purposes. Only recently Fairchild has learned of Internal Revenue Manual Supplement 9G-85 which permits sweeping IRS supervision of grand jury investigations. MS 9G-85 states that it incorporates the substance of procedures in effect since September, 1977.

[13] Except that a stay was granted until Fairchild could request a stay pending appellate review from the Fourth Circuit.

be issued, pending the determination of the appeal and decision on the Petition for Writ of Mandamus. Fairchild's motions for stay of compliance were denied by Judge Winter in a Memorandum and Order dated June 2, 1978.

On August 3, 1978, the Fourth Circuit dismissed the appeal for want of jurisdiction[14] and dismissed the Petition for a Writ of Mandamus on the merits, holding that the petitioner had not "alleged a case of sufficient substance to warrant an evidentiary hearing or to entitle it to the writ."[15] The grand jury investigation of Fairchild is still ongoing, although one indictment was returned on September 8, 1978.

REASONS FOR GRANTING THE WRIT

This case raises fundamentally important questions involving the interpretation in the federal courts of this Court's own Rules of Criminal Procedure, relating to the integrity and secrecy of grand jury proceedings and the fair and proper administration of criminal justice. The central issue is whether present Internal Revenue Service procedures permit the IRS to effectively supervise and control grand jury investigations contrary to Rule 6(e), the many decisions of this Court prohibiting interference with the independence and proper function of the grand jury, and the principles defined in *United States v. La Salle National Bank*, 98 S. Ct. 2357 (1978), barring the IRS, as an institution, from grand jury investigations.

The serious misreading by the government and the Courts below of this Court's and the Congress' recent

[14] The validity of this decision is not raised by this Petition.

[15] *In re Grand Jury Subpoenas, April, 1978, At Baltimore*, 581 F.2d 1103, 1105 (4th Cir. 1978). (App. B, *infra*).

revision of Rule 6(e) has created a major threat to the integrity of the grand jury process, requiring the exercise by this Court of its supervisory power. It is urgent that the Court act now, since the improper grand jury investigation in this case is a continuing one and IRS is presently utilizing these questionable procedures in grand jury investigations throughout the country.

ARGUMENT

I.

FAIRCHILD'S SHOWING BELOW CONSTITUTED A SUFFICIENTLY SUBSTANTIAL CASE OF GRAND JURY ABUSE IN VIOLATION OF RULE 6(e) TO REQUIRE AN EVIDENTIARY HEARING.

The Fourth Circuit, ignoring the plain language and legislative history of revised Rule 6(e),[16] erroneously concluded that the district court was not required to hold an evidentiary hearing, despite a strong showing that IRS procedures permitted the violation of grand jury secrecy and independence. Indeed, the use of these procedures in this case would mean that the grand jury investigation had been improperly initiated, improperly directed and utilized for the improper disclosure of grand jury material. Since IRS officials can normally be expected to follow agency directives, there is a compelling reason for an evidentiary hearing to determine whether in fact these procedures were operative in this case.[17]

[16] App. A(1), *infra*.

[17] At the outset it must be emphasized that contrary to the Fourth Circuit's view, an evidentiary hearing for this purpose would in no way threaten grand jury secrecy. Fairchild seeks no grand jury evidence or any information about grand jury operations themselves. It only seeks to learn whether and how IRS grand jury procedures were implemented in this case without any reference to matters going before the grand jury or to the identity of grand jury witnesses. The history of the secrecy requirement in grand jury proceedings clearly shows that it was for the protection of the independence of

The procedures, themselves, result from a misreading by the IRS and the Department of Justice of the recently amended provision of Rule 6(e)(2)(A)(ii) of the Federal Rules of Criminal Procedure permitting disclosure of grand jury information to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." The Internal Revenue Service has interpreted this language to permit it to use a federal grand jury as an auxiliary investigative tool for IRS investigations. The Department of Justice has acquiesced in this strategy with the result that there has been a usurpation of the federal grand jury by the IRS, under the guise of complying with Rule 6(e), contrary to the express language of the Rule and to the specific intent of this Court, the Judicial Conference of the United States and the Congress.

It is abundantly clear from the new language of Rule 6(e) that all this Court and the Congress intended was to clarify that it is not a breach of grand jury secrecy for a Justice Department prosecutor conducting a grand jury investigation to disclose grand jury information to specific government personnel whose expertise he needs to aid him in the grand jury investigation. The language explicitly states that the disclosure to government personnel may be made only if such personnel "are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." Rule 6(e)(2)(B) prohibits any government agent receiving such disclosure from utilizing it for any

the grand jurors, the safety and integrity of witnesses, and the reputation of persons under investigation. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). Grand jury secrecy was never intended to be used as a cover-up for the government's improper initiation of a grand jury investigation which might endanger the integrity of the grand jury.

other purpose. Were it not for the IRS procedures in this case it would seem unnecessary to emphasize that the amendment was adopted only for the purpose of aiding the grand jury and not for the purpose of benefiting or assisting the IRS or its personnel.

A. *Legislative History*

Even if the language of amended Rule 6(e) were ambiguous, which it is not, the legislative history of the amendment leaves no room for doubt as to its intent and purpose. The original version of the amendment submitted to the Congress by the Chief Justice simply added to the category of persons included as "attorneys for the government," permitted to receive disclosure of grand jury information, "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." This draft did not expressly restrict such assistance to grand jury duties or prohibit the utilization of grand jury material by government personnel for any purpose other than assisting the grand jury. However the Advisory Committee Note to the draft makes it clear that such limitations were intended.[18]

During the hearings before the House Subcommittee on Criminal Justice on this version of the amendment, members of the Subcommittee expressed concern over the lack of clarity of the amendment and the absence of

[18] The Advisory Committee Note states: "Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury." Advisory Committee Note to the proposed amendment to Rule 6, in Communication from the Chief Justice of the United States, H.R. Doc. No. 94-464, 94 Cong., 2nd Sess. 9 (April 26, 1976).

specific protections against misuse of grand jury material through its disclosure to federal agencies.[19] This problem was highlighted by Congressman Hyde when he insisted during the testimony of Professor Wayne LaFave, Reporter for the Advisory Committee on Criminal Rules, that the Rule should specify clearly that the grand jury information obtained by an IRS agent helping a grand jury investigation should not be funneled back to his superiors at IRS.[20]

[19] The need for such restrictive and protective language in any revision of Rule 6(e) was emphasized in the federal cases which prompted the move to amend the rule. *See In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1975).

[20] This interchange was as follows:

(Mr. HYDE) Professor, as I understand your testimony, it is that assurance that information divulged before the grand jury for which the U.S. Attorney wants help from, say, the SEC or the IRS in interpreting, will be immunized from access by administrative agencies because of case law.

(Prof. LaFAVE) That is correct.

(Mr. HYDE) Do[illegible]t you think it would be well if it were specified in the full now that we are broadening access to this information or the availability of this information to assistants of the U.S. Attorney, to specify in the rule that it is for a very limited purpose, namely, the exclusive purpose for which the grand jury is impaneled, rather than leaving it to the — having to search out the case law?

(Prof. LaFAVE) Mr. Hyde, I guess I would agree that that point ought to be made clear. My own personal feeling is that it is clear in the present draft because it specifically states that it must be necessary to assist the attorneys for the government in the performance of their duties.

(Mr. HYDE) The government attorneys' duties are rather broadly based, are they not?

. . .

I have an open mind on this but the limitation is in the broadening of the definition of attorneys for government. It includes those enumerated in 54(c) and such

Congresswoman Holtzman raised with Professor LaFave the very concerns that are present in the instant case. She specifically asked whether there would be a violation of Rule 6(e) if an IRS agent disclosed grand jury information to his superiors. Professor LaFave replied that there would.[21] It never

other personnel as are necessary to assist the attorneys for the government in performance of their duties. That is defining them but doesn't restrict what they are going to do with the information once they have learned it. Once this IRS fellow has sat there and learned the President of the ABC Company is not reporting all of the income, he then tiptoes back to the IRS and how does he expunge that from his mind? What penalties would exist if he were to use that information?

I guess what I'm saying is, would it harm the verbiage of the rule to specify that there is a limit on the use of the information divulged by these other government personnel.

Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 86-87 (Feb. 24, 1977).

[21] The interchange was as follows:

(Ms. HOLTZMAN) . . . really my question goes to whether or not this person (IRS agent) would be covered in the first place from disclosing this material to other people in the Internal Revenue Service.

For example, the provision really with respect to secrecy is the first sentence of Rule 6(e) which says that disclosure of matters may be made to attorneys for the government in performance of their duties. Otherwise they can't disclose.

What are an IRS agent's duties?

Are his duties solely in connection with the grand jury? Does anything spell that out? Or can he in the performance of his duties disclose instances that come to his attention as to misuse to the tax laws?

If he discloses that to his superior in the Internal Revenue Service, would he be in any way violating Rule 6(e)? That is the question that I have and that is why—

(Prof. LaFAVE) I can see your problem and it is a legitimate concern. I would say that maybe the language ought to be changed to make this clearer than it is. I started reading at about line 8 or line 9. My interpretation of that language is that these other government

even occurred to the legislators that the IRS superiors could be included on the list of those authorized to receive grand jury information.

On the basis of these hearings, the House Judiciary Committee rejected the proposed amendment to Rule 6(e) submitted by the Supreme Court because it created the danger that federal agencies would become privy to grand jury information disclosed to agency personnel assisting Justice Department attorneys. This fear was expressed in the report of the Judiciary Committee as follows:

> The substantive change to Rule 6(e) has been much criticized. There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow government agency personnel to obtain grand jury information which they would later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumscribe the investigative procedure otherwise available to them . . .
>
> In short the present state of the law and practice under Rule 6(e) is unclear. Present Rule 6(e) does not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed. It ought to be rewritten entirely. H.R.

personnel may receive this information only to the extent necessary to assist the attorney for the government in the performance of their duties. The question is not what are all the duties of an IRS agent but the question is what are the duties of the attorney for the government. These other experts may use the information only for that purpose.

Let's say one IRS agent is called over to the U.S. Attorney, or perhaps he's an accountant and he says, 'Look can you tell me what this corporate account means?'

I take it he cannot go back to the IRS and report to his superiors, 'Boy, you ought to know what such and such corporation is doing, because I have just found out.'

That is not contemplated by the change.

Hearings, supra note 20, at 91.

> Rep. No. 95-195, 95th Cong., 1st Sess. 4-5 (April 11, 1977).

The Senate Judiciary Committee redrafted Rule 6(e) in its present form, using language it believed appropriately dealt with the concerns expressed by the House Judiciary Committee. The Senate approved the amendment on July 25, 1977 and the House approved it on July 27, 1977, after members of the House Subcommittee on Criminal Justice stated that the Senate redraft provided more protection against misuse of grand jury material by federal agencies than did the original version of the amendment to Rule 6(e).[22] It is submitted that this history makes it clear that disclosure under Rule 6(e) of grand jury material to an IRS agent is for the extremely narrow purpose of aiding the grand jury's investigation of violations of criminal law and cannot, by any reasonable interpretation, justify the procedures of the IRS and the Justice Department in this case, described below, which amount to nothing less than a usurpation of the powers of the grand jury.

B. *IRS Interpretation of Amended Rule 6(e).*

Long before the amendment to Rule 6(e), the IRS had utilized grand jury proceedings to aid it in its civil and criminal activities. So much did the IRS believe it could engage in this tactic openly, that it detailed the procedures for what it called an "open-ended grand jury" in former Section 9267.4 of the Internal Revenue Manual.[23] Also, the IRS prior to November 24, 1976,

[22] 123 *Cong. Rec.* H7865-7868 (daily ed. July 27, 1977) (remarks of Rep. Wiggins).

[23] Section 9267.4 of the Internal Revenue Manual (withdrawn) provided:

Open-ended Grand Jury Proceedings.

(1) Occasionally, investigations into areas of noncompliance are stymied by a series of reluctant witnesses, and it is not possible to determine the precise limits of the tax violations in terms of defendants and taxable periods. If such

had the practice of utilizing a grand jury for the purpose of obtaining the testimony of witnesses who were "uncooperative" with the IRS in the course of its administrative investigation. *See infra* at 29-30.

During this same period Section 9268 of the IRS Manual contained a directive to special agents to debrief grand jury witnesses following their grand jury appearance "in an attempt to obtain the same informa-

investigations become stymied, and it appears that an open-ended grand jury inquiry would probably develop information which would result in prosecution recommendation(s) the special agent should submit a complete report to the Chief containing:

(a) a statement of the investigation to date;

(b) an outline of the proposed criminal case(s) that may be developed;

(c) a list of the witnesses, together with the documents they should produce, that should be subpoenaed;

(d) an outline of the questions that should be propounded to the witnesses;

(e) an evaluation of the potential effect of the case(s) on an area of non-compliance.

(2) The report will be forwarded to the ARC (Intelligence) upon the concurrence of the Chief, Intelligence Division and the District Director.

(3) If the ARC (Intelligence) concurs the report will be forwarded to Regional Counsel.

(4) Regional Counsel will telephonically coordinate the case with the Criminal Tax Division. If Regional Counsel agrees with the recommendation, a detailed criminal reference letter will be prepared and forwarded to the Tax Division of the Department of Justice.

(5) If the Tax Division concurs in the request it will authorize the United States Attorney(s) to institute grand jury proceedings.

(6) Following the appearance of witnesses before the grand jury, the procedures of IRM § 9268 will be followed.

(7) The United States Attorney or the Strike Force Attorney will be advised that jurisdiction of the tax aspects remains with the Internal Revenue Service and the Tax Division, Department of Justice and that prosecutive recommendations under Title 26 will be processed in the regular manner.

tion which the witness furnished to the grand jury."[24] The IRS employed this tactic to avoid grand jury secrecy restrictions and to promptly have grand jury information available for its administrative purposes.

Because the "uncooperative witness" and "witness debriefing" procedures came under attack in federal court proceedings, the IRS terminated these practices.[25] Significantly, at the time the IRS "cleansed" its manual in 1976, it left intact the open-ended grand jury procedure provided for in IRM § 9267.4. However, after the amendment to Rule 6(e) became effective, in October 1977, permitting disclosure of grand jury information to IRS personnel for the sole purpose of rendering technical assistance to attorneys for the government, the IRS removed § 9267.4 as written from the manual. It supplanted it with new interim guidelines[26] and later, on June 30, 1978, issued the directives pertinent here in Internal Revenue Manual Supplement 9G-85.[27] The response of the IRS to the amendment of Rule 6(e) clearly shows that it viewed this amendment as a

[24] IRM § 9268 provided in pertinent part as follows:
Secrecy of Grand Jury Proceedings and Disclosure (Amended by MS 9G-61).

(1) Following an appearance before a grand jury, each grand jury witness should be interviewed by a special agent in an attempt to obtain the same information which the witness furnished to the grand jury. If the witness cooperates, any question of grand jury secrecy and the Service use of grand jury testimony for both criminal and civil purposes can thus be avoided.

(2) If the witness refuses to respond to the questions asked by the special agent, the United States Attorney should be asked to obtain a court order under Rule 6(e). Federal Rules of Criminal Procedure (18 U.S.C. app.), to authorize the Service use of the grand jury testimony for both criminal and civil purposes. In the event the court declines to sign an order, the Chief should seek the advice of Regional Counsel. . . .

[25] *Infra* at 29.

[26] Internal Revenue Manual Supplement 9G-61.

[27] App. A(3) *infra*.

vindication of its earlier grand jury strategy. MS 9G-85, entitled "The Relationship of the Service and Federal Grand Juries," provides elaborate procedures detailing how the IRS would now utilize grand jury investigations and obtain disclosure of grand jury information.

The IRS belief that a federal grand jury was available to it as an auxiliary investigative tool is clearly manifested in Section 3 of the new Manual Supplement headed "Requests for Grand Jury Investigations." Section 3.01 begins with the statement: "Investigations of particular cases or projects may be conducted by means of the administrative process, or by seeking a grand jury investigation." Although this section cautions that the administrative process is the preferred alternative, it provides procedures for obtaining a grand jury investigation to *"assist an IRS investigation."* [Emphasis supplied].

The significance to this case of the directives of MS 9G-85 is that they require the attorney for the government to permit the IRS, *as an institution,* to participate in the grand jury investigation if he is to get any IRS assistance at all. The District Director and Chief of the Intelligence Division of the IRS are directed to "determine the Service personnel that will be assigned to assist the attorney for the Government."[28] To permit these designated IRS employees to receive grand jury information, § 4.01 requires the attorney for the government to "request" their assistance. In his written request list, he *must include,* according to the directive, the names "of all managerial, investigative and secretarial personnel who will necessarily have access to grand jury information." In the context of the directive, the word "necessarily" refers to the needs of the IRS, not of the attorney for the government.

[28] Internal Revenue Manual Supplement 9G-85 § 4.01, App. A(3), *infra.*

Among the IRS managers who must be on the list to receive grand jury information are an intelligence group manager and the Chief of the Intelligence Division and their secretaries. And later, at the conclusion of the grand jury investigation, Regional Counsel attorneys and their secretaries must be added to the list to receive grand jury information to review the final IRS recommendations for or against an indictment.[29] This review of the prosecution decision by the Regional Counsel's office is largely to further IRS policies rather than to assist the attorney for the government in his duties.

Although in this case the IRS requested the grand jury investigation, and was not responding to an initial request for assistance by the attorney for the government, the MS 9G-85 procedures for the latter situation are particularly relevant for the purpose of revealing the underlying strategy of the IRS to supervise and control grand jury investigations. Section 3.07 requires that the government attorney disclose grand jury material to IRS officials even *before* the IRS has agreed to assist him. Indeed, such disclosure is a condition precedent to obtaining assistance under these directives. Thus, in violation of Rule 6(e), the determination of the need for the assistance is made by the IRS — not by the attorney for the government.

It is also clear from this section of MS 9G-85 that the grand jury information obtained by the IRS is *not* used to assist the attorney for the government, as required by Rule 6(e), but is used instead by IRS officials to decide *whether they want to assist him.* For example, Section 3.073 provides:

> upon completion of such a review, the chief, Intelligence Division, will advise the Government attorney *whether or not he/she believes that Service assistance to grand jury is warranted in*

[29] *Id.* at § 7.01.

> *accordance with IRM 9311.2 as well as the standards set forth in Section 3.01 above . . .*[30] [Emphasis supplied].

Sections 3.075 and 3.076 provide that the final decision whether the IRS will agree to assist the attorney for the government cannot be made until after review by a number of IRS officials, including the district director, the regional commissioner, and the regional counsel. All of these officials and their assistants and secretaries must receive, under these directives, grand jury information to permit them to review the request for assistance.

These IRS procedures constitute a blatant usurpation of the grand jury's independent function to investigate federal criminal law and the Justice Department's exclusive responsibility to conduct such investigations. Apart from the impropriety of the disclosure of grand jury material for the purposes identified in these IRS manual procedures, the IRS program is additionally incompatible with Rule 6(e) because of the proliferation of IRS officials permitted to receive grand jury disclosures. The manual provisions include a substantial number of the top supervisory and policy making officials of the IRS among those entitled to receive grand jury material, in addition to the managers, investigators and secretaries who will be supervised by these officials.

This is a far cry from Rule 6(e)'s contemplation of the involvement of only individual IRS agents needed to give technical assistance to an attorney for the government in the interpretation and analysis of complex documents and evidence. The MS 9G-85 provisions greatly broaden the involvement of IRS in the grand jury investigation by loading the attorney for

[30] The standards contained in Section 3.01 relate to IRS priorities, not those that concern the responsibilities of the attorney for the government in performing his duties to enforce the federal criminal law.

the government with a large superstructure of IRS personnel. Since it is clear that an IRS agent assigned to a grand jury investigation must work only as an assistant to the attorney for the government, it is wholly unnecessary and destructive of grand jury secrecy that he bring over with him all of his supervisory, administrative and secretarial support.

It is beyond reason for the government to contend that this widespread dissemination of grand jury information among IRS officials meets the restrictive language of Rule 6(e). Indeed, the IRS manual provisions exceed the worst fears of the congressmen who sought to limit the language of Rule 6(e) so that it would meet only the exclusive needs of the government attorney conducting the grand jury investigation.

The IRS has also made it clear that it proposes to use grand jury information for civil purposes through a strategy that exploits the provisions of Rule 6(e)(2)(C)(i) relating to judicial orders. Section 7.02 of MS 9G-85 directs the Chief of the Intelligence Division to ask the attorney for the government to obtain a Rule 6(e) order permitting the release of grand jury information for *civil purposes "when the tax consequences warrant."* (Emphasis supplied.) This section becomes even more significant when it is read together with the companion language of the IRS Chief Counsel's order 3060.1, dated June 23, 1978.[31] Chapter 4, paragraph 47a of this order directs:

> 47. NEED FOR COURT ORDER UNDER RULE 6(e). All closings of matters involving grand jury information should be handled by either the docket attorney who handled the grand jury case evaluation for the matter or the supervisor who reviewed the grand jury evaluation for that matter.
>
> a. If, in the opinion of that docket attorney or supervisor, the grand jury information which is

[31] MS 9G-85 is dated seven days later, June 30, 1978.

known to exist *bears upon the determination and/or collectibility of civil liabilities, the closing memorandum must set forth that opinion together with the recommendation that the assisting agent request the attorney for the government to seek a court order under Fed. R. Crim. P. 6(e) removing that information from the secrecy provision governing grand juries and, contrarily, making it available to the Service for use in determining and collecting civil liabilities. No actual grand jury information should be contained in the closing memorandum.* . . . [Emphasis supplied.]

It is difficult to imagine a more direct violation of Rule 6(e) which prohibits the utilization of grand jury information by IRS personnel for any purpose other than to assist the attorney for the government in the performance of his duty to enforce the federal criminal law. Clearly, it is a subversion of Rule 6(e) for IRS personnel, who are given access to grand jury information, to examine that information in order to discover how it can be used for the civil purpose of the IRS, and then to ask the attorney for the government to get the information released from secrecy restrictions through a Rule 6(e) order.

Grand jury information can, of course, be used for civil purposes on the authority of a court order under Rule 6(e)(2)(c)(i). But these IRS directives reduce the Rule 6(e) order procedure to a mere charade, with the IRS deploying its agents inside the grand jury investigations to spot evidence useful to its civil cases, and using the attorney for the government[32] as an instrument to have that evidence freed from the requirements of grand jury secrecy. When these tactics are used in a jurisdiction like the Fourth Circuit, where application for Rule 6(e) orders are heard *ex parte*,[33] Rule 6(e)(2)(c)(i) becomes practically nullified.

[32] This IRS directive would also appear to require the attorney for the government to violate Rule 6(e)(2)(A)(i) which permits disclosing of grand jury information to the attorney for the government *only* "for use in the performance of such attorney's duty." Obtaining Rule 6(e) orders for the IRS to permit the IRS to use grand jury information in civil cases would hardly be included among the duties of the attorney for the government.

The misinterpretation by IRS of amended Rule 6(e) and the resulting threat to grand jury secrecy, have become particularly urgent, requiring this Court's review, because the Fourth Circuit in this case ratified the grand jury strategy of IRS. While the Fourth Circuit and counsel for Fairchild were not aware of the existence of MS 9G-85 at the time of oral argument, Fairchild had brought to the attention of the Court the interim IRS manual guidelines, MS 9G-61, which required in Section 4.07 that a revenue agent assigned to a grand jury investigation disclose grand jury information to the Chief of the Intelligence Division. In fact, the government informed the court during argument that such disclosures were being made.[34] The Court of Appeals approved this practice with the following language:

> At oral argument, we were advised that the special agents assigned to the instant investigation have been filing reports of the proceedings with their superior, the Chief of the Service's Intelli-

[33] App. B, *infra*.

[34] The Government knew when this information was supplied the Fourth Circuit that MS 9G-61 had been supplanted by the more sweeping grand jury disclosure procedures of MS 9G-85 and did not advise the Court or counsel for Fairchild of this fact. Whether the Government appellate counsel had this information is not known. However, the government had the responsibility to correct this misunderstanding of a significant factual matter. Counsel for Fairchild did not learn of MS 9G-85 until October, 1978, when it was published. The government's failure to disclose the existence of 9G-85, despite Counsel's request for information of the IRS procedures applicable to this case, prevented Counsel from arguing to the Fourth Circuit the significance of MS 9G-85 to the issues of this case.

> gence Division. We assume that the district court has also been advised of this fact. So long as the district court is aware of this disclosure, we do not view it as a breach of Rule 6(e)(2)(B). It is the obligation of the Chief of the Intelligence Division to supervise the special agents assigned to that Division. That these agents have been assigned temporarily to assist in a grand jury investigation makes them no iess responsibile to their supervisor. Effective supervision is impossible if the supervisor is unaware of his agents' activities. Thus, we think disclosure necessary to assist the Chief in the performance of his duties.[35]

It is clear from this statement that the Fourth Circuit also misread amended Rule 6(e). Under the amendment, disclosure of grand jury information to government personnel is permitted only when it is necessary to aid the attorney for the government in the performance of *his* duties in the grand jury investigation — and not, as the Fourth Circuit found when "the disclosure is necessary to assist the Chief [of the Intelligence Division] in the performance of his duties." The Fourth Circuit is clearly wrong in its conclusion that IRS agents assisting the grand jury investigation, under Rule 6(e), perform these grand jury duties under the supervision of their IRS superiors. On the contrary, the amendment and its legislative history make it very clear that such agents must work strictly under the supervision of the prosecutor and are forbidden by the Rule to disclose grand jury information to anyone outside the investigation, including their IRS superiors.

This duty of secrecy surely cannot be avoided by the facile tactic, suggested by the Fourth Circuit, of adding the names of IRS superiors to the list of persons submitted to the court who are authorized to receive

[35] App. B, *infra*. The Fourth Circuit may well have responded differently concerning the impact on grand jury secrecy of the directives of MS 9G-85 had it been advised by the government of their existence.

disclosures of grand jury information. Under Rule 6(e) that list must include only those persons who are deemed necessary by the attorney for the government to aid *him* in his duty to enforce the federal criminal law. It would be a clear contradiction of the purpose of the Rule to conclude, as the Fourth Circuit did, that when an IRS agent comes over to the prosecutor to assist the grand jury investigation, he must also bring with him the full IRS supervisory structure.

With the Fourth Circuit endorsement of its grand jury strategy in this case, the IRS is able to launch its new more sweeping procedures of MS 9G-85 for the exploitation of grand jury information. These practices pose a serious threat to the independence and integrity of grand juries throughout the country. It is submitted that this case presents a compelling issue requiring resolution by this Court concerning the Court's own rules and the integrity of federal grand jury process. The opinion of the Fourth Circuit provides the first interpretation of the new disclosure provisions of amended Rule 6(e) as they apply to the personnel of federal agencies. It is Fairchild's position that this interpretation is clearly erroneous and detrimental to the administration of justice in the investigation of suspected violations of federal criminal law by federal grand juries.

II.

THE FOURTH CIRCUIT'S DENIAL OF MANDAMUS RELIEF FOR FAIRCHILD WAS ERRONEOUS.

It seems clear that if this grand jury investigation were found to be in fact dominated and effectively supervised by the IRS in furtherance of its interests, and not conducted by the attorney for the government for the sole purpose of enforcing the federal criminal law, no federal court could properly permit its continu-

ance or validate any of its actions. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1956). While this Court in *Procter & Gamble* remanded the case to the district court because of the absence of a specific factual finding that the government initiated the grand jury investigation for non-criminal reasons, it acknowledged that the government "would be flouting the policy of the law" and that there would be abuse of the grand jury process if it could be established that the grand jury was being used for the purposes of a government agency.

Petitioner submits that the new IRS procedures contained in MS 9G-85, which are referred to in the preceding argument, detailing the IRS strategy for controlling grand jury investigations of tax offenses, are sufficient evidence, by themselves, that the IRS is flouting the policy of the law and abusing the grand jury process. At the least they provide a compelling reason for this Court to remand this case for an evidentiary hearing on how these IRS grand jury procedures were implemented in this case.[36] Although

[36] Such an evidentiary hearing, to determine how federal agency procedures were applied in a grand jury proceeding, took place at the district court level in *In re: Paul Perlin, A Witness Before The April 1977 Grand Jury*, No. 78-2139, slip op. (7th Cir. October 4, 1978). In that case, a grand jury investigation concerning commodities trading in Chicago, the Director of the Commodities Futures Trading Commission Division of Enforcement, along with "a number of personnel" from the Division were designated Rule 6(e) "disclosees" to assist the grand jury. The petitioner alleged that such disclosure allowed the use of grand jury information for civil prosecution purposes. The Seventh Circuit conceded that disclosure of this sort created "an increased risk of leakage into the ongoing civil investigations," but found that no such leaks actually occurred. *Id.* at 15. The court was able to determine what, in fact, had occurred because the district court, upon being confronted with allegations of grand jury abuse, held an evidentiary hearing. Fairchild merely seeks the chance, provided in the Seventh Circuit, to prove that IRS directives aimed at supervising grand jury investigations were implemented in this case.

MS 9G-85 was not issued when this case was before the district court, it is clear that it reflects a long standing practice of IRS to employ grand jury investigations for its own interests, which *was shown* to the court by Fairchild.[37]

In support of its request for an evidentiary hearing Fairchild cited to the district court the abusive IRS practice permitted under the IRS "open-ended" grand jury procedure of former Internal Revenue Manual Section 9267.4; the IRS "uncooperative witness" strategy, and the grand jury "witness debriefing" procedure of former Manual Section 9268. Though conceptually different from the present procedures of MS 9G-85, these earlier procedures sought to accomplish the same exploitation of grand jury investigations for IRS purposes.

The IRS has actually acknowledged that two of these earlier procedures, the "uncooperative witness" and the "witness debriefing" procedures, were determined by the Department of Justice to be improper infringements of the grand jury's function. In a remarkably candid directive by telegram on November 24, 1976 (which became Manual Supplement 9G-61, dated July 29, 1977), the IRS stated:

> .01 Effective immediately the provisions of IRM 9267.1, 9267.2, 9268, and 7(14)2: (2) of IRM 4235, Techniques Handbook for In-Depth Audit Investigations are suspended. Detailed procedures will be issued shortly.
>
> .02 The propriety of Service procedures relative to the Grand Jury are currently under direct attack in a United States District Court. In that case the court requested an amicus curiae brief of the

[37] Section 2.10 of 9G-85 reveals that the new Manual Supplement incorporates the *substance* of interim grand jury guidelines in effect as early as September, 1977.

> Service discussing its relationship to Grand Juries in the course of tax investigations. Discussions were then held between the Department of Justice and the Internal Revenue Service as a first step in the resolution of this matter. The Department of Justice voiced the position that the uncooperative witness procedure and the debriefing procedure were not sustainable. They concluded that the uncooperative witness procedure is improper in that control of the investigation does not remain within the authority of the Grand Jury. They further concluded that the debriefing procedure under IRM 9268 is improper in that it may be construed to be a device used to improperly obtain Grand Jury material for civil purposes.
>
> .03 As a result of this discussion, an oral agreement was reached between the Department of Justice and the Internal Revenue Service that: (1) the debriefing procedure set forth in IRM 9268 will no longer be used; and (2) once a tax investigation is referred to the Department of Justice for Grand Jury investigation, the investigation thereafter will remain under the Grand Jury.

Although, by this directive, the IRS was on record at the time this grand jury investigation began that the "uncooperative witness" and "witness debriefing" procedures had been discontinued, there had been no similar directive ending the "open-ended" grand jury procedure, which was a primitive version of the present IRS grand jury procedures. In addition, the tactics employed by the IRS in the instant case, which were also alleged by Fairchild as part of its showing to the district court, demonstrated that the "uncooperative witness" procedure was still, in fact, being utilized by the IRS despite the directive to the contrary. The facts are undisputed that the IRS abandoned its civil administrative investigation and switched to a grand jury investigation after certain summonses had been challenged by Fairchild and the challenge had been upheld by the district court. The same IRS agents who

had conducted the administrative investigation were assigned by the IRS to the grand jury investigation. Among the first subpoenas served on Fairchild by these agents in their new role as grand jury investigators were ones which called for the production of the same items sought by the summonses that Fairchild had successfully challenged earlier on grounds that were applicable to the civil proceeding, but not now to the grand jury proceeding.

Thus, the district court was presented with sufficient facts to make a strong showing of grand jury abuse by the government. In the face of this showing, it was incumbent on the district court to provide an evidentiary inquiry under its duty to safeguard the judicial process of which the grand jury has been made a part by the Constitution itself. *See Cobbledick v. United States,* 309 U.S. 323, 327 (1939). This duty requires the district court to supervise the grand jury and protect its independence and integrity. *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1971) (Hufstedler, J. concurring). The district court's refusal to make any evidentiary inquiry at all, and its reliance, instead, solely on the prosecutor's self-serving and conclusory affidavit that the grand jury had only a criminal investigation purpose "amounted to little less than an abdication of the judicial function . . ." *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 256 (1957).[38]

[38] The conclusion of the Court of Appeals that the district court could properly rely on the government's unsupported affidavit is incompatible with the supervisory duty of the Court to protect the grand jury process. The Court of Appeals, in effect, permitted the government the benefit of a presumption of regularity. However, such a presumption cannot survive the showing made by Fairchild in this case. And clearly in light of the IRS manual provisions discussed above, the government cannot in good faith claim a presumption of regularity with regard to grand jury investigations of federal tax offenses.

In ruling against Fairchild the district court held that the executive branch had "unfettered discretion" to conduct grand jury investigations, relying on *United States v. Cox,* 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965).[39] However, the *Cox* case does not support this position. In *Cox* the prosecutor had refused to sign an indictment despite an order of the Court directing him to sign. Supporting the action of the prosecutor, the Court of Appeals for the Fifth Circuit held that the decision to initiate a prosecution is within the unfettered discretion of the executive branch. But the prosecutor has no such discretion in a grand jury investigation. As an arm of the Court a grand jury makes a "judicial inquiry" and it is the Court's responsibility to oversee its proper function. *Cobbledick v. United States* at 327. The holding of the district court in this case, that the prosecutor is "unfettered" in the grand jury, clearly amounts to an abdication of judicial responsibility and power.

Because of the clear abuse of discretion on the part of the district court this case falls squarely within the category of exceptional cases recognized by this Court as justifying the use of mandamus under the All Writs Act, 28 U.S.C. § 1651. *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964). The Fourth Circuit was clearly wrong in finding no abuse of discretion by the district court. The Court mistakenly assumed that the "open-ended" grand jury procedure of the IRS had been abandoned by the time the grand jury in this case began its investigation. It misjudged the significance of the provisions of the July 29, 1977 revision of IRM § 9267, MS 9G-61, which substituted a more effective strategy to utilize grand jury investigations for the "open-ended" grand jury procedure. The Court's approval of this strategy constituted a clearly erroneous interpretation of Rule 6(e).

[39] App. C, *infra.*

Moreover, the Fourth Circuit was unaware at the time it wrote its opinion that far from abandoning its "open-ended" grand jury procedure, the IRS had, under its distorted reading of Rule 6(e), issued MS 9G-85, which is a much more sweeping program to control grand jury investigations. These Manual Supplement provisions, more fully discussed above, so substantially contradict the conclusions of the Fourth Circuit on the issue of grand jury abuse by the IRS that this Court should remand this case to the Court below to reconsider it in light of the new manual provisions.

The Fourth Circuit also misread the earlier "open-ended" grand jury procedure to have no application to civil enforcement functions of the IRS. Former IRM Section 9267.4, which defined this practice, specifically provided for feedback of grand jury information for civil purposes. It required that the IRS grand jury "witness debriefing" procedure of IRM Section 9268[40] be utilized to permit the IRS to learn every thing the grand jury was hearing.

Further, the Fourth Circuit erroneously decided that Fairchild was not entitled to Mandamus relief because it was protected by Rule 6(e) on the issues it raised either through the contempt sanctions for improper disclosure of grand jury information or through the refusal of a judge to grant a Rule 6(e) order for use of grand jury evidence in a civil case. It is submitted that the Court has ignored reality and offered Fairchild only the illusion of protection. By approving the sharing of grand jury information with supervisory IRS personnel, the Court has made meaningless the sanction of contempt, since it has validated the largest unauthorized disclosure of grand jury information under Rule 6(e). Likewise, with grand jury information freely in the hands of IRS management and supervisory personnel, the screen of a Rule 6(e) order is transformed into an

[40] *Supra* note 24, at 19.

open door, with the IRS officials knowing exactly what they want and the court having no reason presented to it to deny them.

Moreover, the protective purpose of the rule becomes even more illusory when the Rule 6(e) order proceeding is *ex parte* as affirmed by the court below. It makes no sense to tell Fairchild, as the Fourth Circuit did in this case, to seek protection at "another time and in another manner," if, when a Rule 6(e) order is sought, Fairchild can never know when and if an application for such an order will be made. And even if Fairchild learns about it, Fairchild has no right to be heard under the interpretation by the Fourth Circuit. The suggestion by the Fourth Circuit that even an *ex parte* proceeding can permit a full inquiry ignores the fact that the fullness of an inquiry depends upon the participation of interested parties. No matter how conscientious it is, the court cannot be expected to inquire into abuses about which it is uninformed or unaware.

The alternative remedy, suggested by the Fourth Circuit of suppression of unlawfully disclosed grand jury evidence in the civil tax case appears to be equally unavailing to Fairchild. This Court has declared its unwillingness to extend the exclusionary rule to civil tax cases. *See United States v. Janis,* 428 U.S. 433 (1976).

III.

THE FOURTH CIRCUIT'S RATIFICATION OF IRS INSTITUTIONAL PARTICIPATION IN GRAND JURY INVESTIGATIONS IS INCONSISTENT WITH THIS COURT'S OPINION IN *LaSalle.*

In *United States v. LaSalle National Bank,* 98 S. Ct. 2357 (1978) this Court emphasized that the IRS must leave the criminal prosecution to the Department of Justice and the grand jury. Also, this Court has repeatedly held that the sole function of federal grand juries is the investigation of violations of federal

criminal law and that such an investigation is in the nature of a grand inquest conducted by citizens acting independently and objectively. *Wood v. Georgia,* 370 U.S. 375, 390 (1962); *Blair v. United States,* 250 U.S. 273, 282 (1919); *Hale v. Henkel,* 201 U.S. 43, 59-66 (1906); *Ex parte Bain* 121 U.S. 1, 11 (1887). It is the very essence of the grand jury role that, unlike the government's role, it does not conduct its inquiry as a partisan. The significance of this role was emphasized by this Court in *Ex parte Bain* when it said:

> . . . the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from the government or it be prompted by partisan passion or private enmity. *Id.*

Primarily for the purpose of permitting the grand jury to perform this objective, non-partisan function, this Court has permitted the grand jury to exercise broad powers to compel the appearance of witnesses and the production of documents and has not extended to grand jury witnesses or targets many of the protections under the First, Fourth, Fifth and Sixth amendments to the Constitution applicable to other stages of the criminal process. *United States v. Calandra,* 414 U.S. 338 (1974); *Branzburg v. Hayes,* 408 U.S. 665 (1972); *Hoffman v. United States,* 341 U.S. 479 (1951); *Blair v. United States, supra.*

This role is incompatible with the use of the grand jury for investigative errands of other government agencies, like the IRS, even with the acquiescence of the Department of Justice. For it is not the federal prosecutor's grand jury; the grand jury functions as an arm of the Court, under the Court's general supervision, and uses the Court's process. Moreover, it is charged

with acting independently in its deliberations and ultimate findings. The most celebrated demonstrations of this independent and protective role of the grand jury are the *Trial of Stephen College,* 8 How. St. Tr. 549, 550 (1681) and the *Trial of the Earl of Shaftesbury,* 8 How. St. Tr. 759, 771-74 (1681). In both cases the grand jury withstood considerable pressure from the Crown in refusing to return a true bill. A leading commentary summarized this development:

> It was in this period that the independence of the grand jury became established. No longer required to make known to the courts the evidence upon which they acted, meeting in secret and sworn to keep their proceedings secret by an oath which contained no reservation in favor of the government . . . The independence which the institution had obtained would soon be put to the severest tests, but protected by the cloak of secrecy and free from the control of the court as to their findings, they successfully thwarted the unjust designs of the government. Edwards, *The Grand Jury,* at 28 (1906).

It was this concept of the grand jury that the framers of the Constitution cherished and believed so essential for individual liberty that they included it in the Bill of Rights as a part of the Fifth Amendment. *Russell v. United States,* 369 U.S. 749, 761 (1962); *Costello v. United States,* 350 U.S. 359, 362 (1956); *Hale v. Henkel supra* at 59-66.

This history and the decisions of this Court defining the role of the federal grand jury in the United States clearly make intolerable the grand jury strategy of the IRS present in this case and permitted now by the decision of the Fourth Circuit to be employed in countless other cases. In effect, the IRS is ignoring the prohibition by this Court that it "cannot try its own prosecutions." *LaSalle,* at 2365. Although, the holding of this Court in *LaSalle* related to another issue — the

validity of the use of IRS summonses after the referral of the case by the IRS to the Department of Justice for prosecution — Fairchild submits that the Court's underlying reasoning in *LaSalle* is especially relevant to this case.

The Court held in *LaSalle* that the IRS must stop gathering evidence by summons, even for a civil purpose, once it has referred the case to the Department of Justice. This was because, the Court said, the IRS has no right to engage in criminal prosecution or to interfere with or affect grand jury investigations. It is significant, for the purposes of this case, that although the Court recognized the logic supporting the continued use by the IRS of its summons power to pursue its civil tax functions after referral to the Justice Department, it refused to permit this bifurcation of functions because it concluded that the civil and criminal functions of the IRS are so intertwined as to make it impractical to isolate them or to prevent the appearance, if not the actuality, of IRS participation in the gathering of evidence for the grand jury.

For the same reason, the new IRS directives contained in MS 9G-85, referred to above, must be clearly objectionable under *LaSalle.* Although presented as an IRS response to the amendment of Rule 6(e), these provisions effectively put the IRS, as an institution, in control and supervision of grand jury investigations. It is not Fairchild's position, of course, that grand jury assistance by IRS personnel, in itself, is improper under *LaSalle.* Clearly, this Court, by sponsoring the amendment to Rule 6(e), approved such assistance, but only to the extent necessary to aid the attorney for the government in the performance of his grand jury duties, and not for any institutional purposes of the IRS. However, the new IRS procedures go far beyond formalizing how individual IRS agents will be assigned to assist grand jury investigations under Rule 6(e).

They mandate participation by the IRS, as an institution, in grand jury investigations.

Although this Court, in *LaSalle*, stated that the limitation on IRS investigative procedures occurs upon the recommendation for criminal prosecution to the Department of Justice, the same limitation should also occur upon the recommendation to the Department of Justice for a grand jury investigation. The Court imposed such a limitation on IRS summons practices in order to avoid the danger of the IRS broadening the evidence-gathering powers of the grand jury or infringing on the role of the grand jury. These same dangers are equally present when the IRS refers a case to the Justice Department for grand jury investigation. Indeed, Fairchild submits that the new IRS procedures reveal that the grand jury's role is more seriously threatened when the referral is for grand jury investigation than when the referral is for prosecution after the IRS has completed its own investigation and review procedures on the criminal matter.

This is because the IRS, in effect, runs the grand jury investigation through its direction and supervision of its agents assigned to the attorney for the government. As discussed above, the investigative functions of IRS agents assisting the grand jury investigation are required by MS 9G-85 to be supervised and directed by their IRS superiors. This supervision extends to the serving of grand jury subpoenas, the questioning of grand jury witnesses and the analysis and interpretation of grand jury evidence.

Thus, the same management, administrative and investigative IRS team that would have conducted the administrative investigation through the use of IRS summonses, now conducts the grand jury investigation, with the more sweeping power of grand jury subpoenas. It would appear, therefore, that this Court may have

accomplished little in *LaSalle* by prohibiting the IRS from using its summonses after a referral to the Department of Justice. Doubtless, the IRS has obeyed that prohibition. However, it has designed an even more effective strategy to "prosecute its own cases" by indirectly running the grand jury investigation itself.

It is important to note that MS 9G-85 not only permits IRS to direct the grand jury investigation but also seeks to retain substantial IRS participation in the prosecution decision *after* referral to the Justice Department. This practice, present in this case, is significantly different from the one described with approval by this Court in *LaSalle*. The familiar IRS process outlined by the Court includes an administrative investigation and elaborate internal review procedures on the question of whether prosecution should be recommended *before* a referral to the Justice Department. The Court noted that:

> . . . the layers of review provide the tax-payer with substantial protection against the hasty or overzealous judgment of the special agent. The tax-payer may obtain a conference with the district Intelligence Division officials upon request or whenever the chief of the Division determines that a conference would be in the best interest of the Government. *LaSalle* at 2367.

When the IRS refers a matter to the Justice Department, not for prosecution, but *for a grand jury investigation* in the midst of its own administrative investigation, the teaching of *LaSalle* is still that the IRS has no further role in the criminal case. The responsibility to carry on the investigation and to decide whether to prosecute rests with the grand jury and the Justice Department.

However, the IRS has refused to let go. When it elects to proceed by grand jury investigation, the IRS has devised a mechanism to allow it to continue to

participate in the prosecution decision at the completion of the investigation. The new manual provisions transfer to the IRS grand jury team the function of recommending or disaproving prosecution.

To accomplish this, MS 9G-85 directs that there must be included on the list of persons authorized by the attorney for the government to receive grand jury information those policy making and supervisory IRS personnel (such as the District Director and the Regional Counsel), who are the ones usually responsible for prosecution decisions. In this way the IRS has sought to maintain control over the prosecution decision, not through an internal IRS procedure, but within the context of the grand jury investigation, itself, and based on the supposedly secret information obtained by the grand jury. There is no provision in these manual grand jury procedures for taxpayer conferences.

It is further submitted that this grand jury strategy of the IRS cannot be condoned simply because the IRS has sought to segregate inside IRS its grand jury function from its civil function. In a futile effort to comply with the express prohibition of Rule 6(e) against unauthorized disclosure of grand jury material, the new IRS Manual provisions contain directions that IRS supervisory, administrative and investigative personnel receiving grand jury information should not reveal that information to other IRS personnel. In addition, there are provisions for segregation of grand jury material from non-grand-jury material, and directing IRS management and supervisory personnel privy to grand jury information to delegate their civil functions to subordinates.[41]

[41] These procedures seem to be contradicted in spirit, if not in fact, by § 7.02 of MS 9G-85 and Ch. 4, para. 47a of Order 3060.1, office of the Chief Counsel, *supra*, at 23. These directives order IRS agents working inside the grand jury

These provisions must fall of their own weight. On the basis of different facts, but for reasons directly applicable here, this Court in *LaSalle* found that the civil and criminal functions of the IRS could not be segregated. The Court found that Congress in enacting the tax code had "created a law enforcement system in which criminal and civil elements were inherently intertwined." *LaSalle* at 2363. The Court concluded that unless there has been an institutional abandonment of a civil purpose by the IRS in a given case, the IRS or any institutional segment of it, cannot be deemed to be pursuing an investigation solely for a criminal purpose.

Clearly, in the instant case, the IRS has not abandoned a civil purpose, since there is pending a major tax suit relating to the same subject matter of the grand jury investigation. Therefore the IRS scheme in its present Manual provisions to segregate criminal and civil functions for the purpose of preventing a spillover of information from one function to the other has already been rejected by this Court in *LaSalle*.

This Court, in that case, refused to permit such a segregation of information between two branches of the Executive, the Justice Department and IRS, because of the "inherently intertwined nature of the criminal and civil elements of the case." *Id.* Certainly, therefore, this Court should not find workable such an information barrier when it is attempted to be erected *inside one of those branches* — especially the one possessing, under the Code, interrelated civil and criminal functions.

The fact that in *LaSalle* the Court expressed concern over the flow of subpoenaed information from the IRS to the grand jury after referral had been made to the Department of Justice, does not, of course, mean that

investigation to identify grand jury information useful for IRS civil purposes and then ask the attorney for the government to obtain a Rule 6(e) order to release this evidence from grand jury secrecy restrictions.

this Court is not equally concerned when the flow of subpoenaed information goes the other way. Indeed, it is submitted that the policy considerations are even greater when grand jury information is used to aid a civil case without a court order under Rule 6(e). The values attached by this Court to grand jury secrecy and to the protection against misuse of grand jury proceedings for civil purposes are deeply related to the cause of freedom and individual liberty upon which the Bill of Rights is rooted.

IV.

THE INVOLVEMENT IN THE GRAND JURY INVESTIGATION OF IRS LAWYERS WHO ALSO PARTICIPATED IN THE ADMINISTRATIVE INVESTIGATION OF THE SAME TAXPAYER INVALIDATED THE GRAND JURY INVESTIGATION.

Fairchild is entitled to an evidentiary hearing to determine whether IRS lawyers who took part in the IRS investigation are now actively participating in the grand jury investigation, resulting in a conflict of interest prohibited by Canon 9 of the ABA Code of Professional Responsibility and Section 1.2(a) of the ABA Standards Relating to the Prosecution Function. The government has admitted before the Fourth Circuit during the course of the argument before Judge Winter on Fairchild's motion for a stay pending appeal that an attorney or attorneys in the IRS Regional Counsel's office have been assigned to assist the grand jury in its investigation. It is also uncontroverted that lawyers in the Regional Counsel's office participated in the IRS investigation of Fairchild and in the IRS recommendation for this grand jury investigation. In *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W. D. Tex. 1977), grand jury proceedings were voided because of an apparent conflict of interest on the part of a government attorney participating in a grand jury investigation. The court held that such a conflict of interest may

arise when the lawyer had been employed by the government agency which instigated the criminal investigation and had previously participated in or passed on the same matter in his capacity as an agency lawyer.

The authorities under state law are likewise in unanimous agreement that the involvement of a prosecutor who is disqualified under ethical canons renders a grand jury investigation invalid. *See, e.g., People v. Superior Ct. of Contra Costa County,* 19 Cal. 3d 255, 561 P.2d 1164 (1977); *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (1975); *People v. Krstovich,* 72 Misc. 2d 90, 93-95, 338 N.Y.S.2d 132, 137-138 (Greene County Ct. 1972); *Corbin v. Broadman,* 6 Ariz. App. 436, 442, 433 P.2d 289, 295 (1967); *Maley v. Dist. Ct. of Woodbury County,* 266 N.W. 815, 817-819 (Iowa 1936); *Coblentz v. State,* 164 Md. 558, 565-567, 166 A. 45, 48-50 (1933); *State v. Rocker,* 106 N.W. 645, 646-647 (Iowa 1906).

It is submitted that it is not a relevant distinction that in *Braniff* the government lawyer with the conflict of interest appeared in the grand jury room and the IRS lawyers in this case did not. As the Court in *Braniff* emphasized, the harm to the grand jury process and the system of justice is not limited to that caused by the presence of an unauthorized person in the grand jury room. It includes equally, if not more importantly, the loss of confidence of the public in the fairness and objectivity of the grand jury. Such loss of confidence results just as much from knowledge that a lawyer screening evidence for the grand jury has a serious conflict of interest as it does from knowledge that such a lawyer is working inside the grand jury room itself.

As this Court explained in *Costello v. United States,* at 362-363, grand juries are "pledged to indict no one because of prejudice" and the Fifth Amendment requires that the grand jury be "legally constituted and

unbiased." This Court has repeatedly said that the mission of the grand jury is not only to indict, but also to stand between the accused and the prosecutor to "[protect] citizens against unfounded criminal prosecutions." *United States v. Calandra,* at 342-344; *see, Branzburg v. Hayes,* at 686-687; *Hoffman v. United States,* at 485. Indispensable to this mission are the independence and impartiality of the grand jury, which are rendered suspect when an IRS lawyer, charged with assembling and screening the evidence presented to the grand jury, has an apparent serious conflict of interest.

The American Bar Association's Standards Relating to the Prosecution Function and the Defense Function state that, "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties." § 1.2(a) (Approved Draft, 1971). The ABA Standards expressly warn that a conflict may arise when, for example an "associate [of the prosecutor] . . . has any interest in a criminal case . . . including as a complaining witness. . . ." In the instant case, the IRS agents who are attorneys now participating in the grand jury investigation have such a conflict since the IRS, as the complaining witness, had requested the criminal investigation to determine whether a fraud had been perpertrated on IRS by Fairchild.[42] Moreover, before their assignment to the grand jury investigation, these agents had been involved in the IRS investigation and the recommendation to the Department of Justice for the criminal inquiry.

Courts have also consistently held that a government attorney who has investigated or considered matters in

[42] It has long been held that a prosecutor who is in any way associated with the victim of the alleged offense has a conflict of interest. *See State v. Hill, supra; People v. Krstovich, supra; Coblentz v. State, supra.* See also, *Ganger v. Peyton,* 379 F.2d 709 (4th Cir. 1967); *People v. Superior Ct. of Contra Costa County, supra.*

his official capacity is disqualified from subsequently representing another client with respect to those or substantially related matters. *See United States v. Braniff Airways, Inc.; General Motors Corp. v. City of New York,* 501 F.2d 639, 648-652 (2d Cir. 1974); *United States v. Trafficante,* 328 F.2d 117 (5th Cir. 1964).

Here, the IRS agents' former participation in the IRS case with respect to the same matters under investigation disqualified them from later seeking to act as essential assistants to the attorney for the government before the grand jury. The conflict is even further exacerbated by the fact that the IRS is the putative "victim" and complaining witness in this case and that these lawyers continue to be on the IRS payroll after their assignment to the grand jury investigation. Fairchild has legitimate reason to fear that these lawyers will be exposed to the obvious pressures to justify the criminal investigatory recommendations which they and their IRS superiors had made and would seek to promote IRS objectives in their role in the grand jury investigation.

In this case Fairchild believes it has been subjected to a fundamentally unfair practice by the government. It was initially investigated by the IRS through a process which allowed it substantial participation and protection. When it asserted procedural rights permitted by law — and was vindicated by a court decision — it found itself the target of a grand jury investigation being run by the same IRS agents who it had reason to fear were vindictive and punitive. Whatever the form of the proceedings, Fairchild has good reason to believe it is being prosecuted by the IRS. Any fair minded person observing the IRS tactics employed here must believe likewise and come away with much less confidence in the fairness and objectivity of federal grand jury investigations. This Court should exercise its supervisory power to assure that these IRS procedures which

detract from the value and function of the grand jury as an independent grand inquest are terminated.

CONCLUSION

For these reasons this Court should issue a writ of certiorari to review the judgment and opinion of the Fourth Circuit in this case.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 29th day of December, 1978, three copies of the foregoing Petition for Certiorari were mailed, postage prepaid, to Hon. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

Samuel Dash

APPENDIX A

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(1) Federal Rule of Criminal Procedure 6.

* * * * * *

(e) Secrecy of Proceedings and Disclosure.—

(1) General Rule. — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.--

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments. — The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(2) 28 U.S.C. § 1651 — Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(3) Internal Revenue Manual Supplement 9G-85.

The Relationship of the Service and Federal Grand Juries

Section 1. Purpose

This Supplement provides a statement of responsibilities and procedures pertaining to the relationship between the Service and Federal grand juries. This Manual Supplement does not apply to inspection.

Section 2. Background

.01 Federal Rule of Criminal Procedure 6(e), (hereafter cited as Rule 6(e)) governs the secrecy and disclosure of grand jury information. The Rule was recently amended by Congress (Public Law 95-78) with an effective date of October 1, 1977.

.02 Rule 6(e) as amended states in pertinent part:

"(e) Secrecy of Proceedings and Disclosure.—

"(1) General Rule. — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) Exceptions.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize the grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so

disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

.03 Pursuant to Rule 6(e) as amended, disclosure of matters occurring before the grand jury may clearly be made to such Service personnel as are deemed necessary by an attorney for the Government to assist in the performance of such attorney's duty to enforce Federal criminal law. Service personnel to whom disclosure is made under this authority shall not disclose matters occurring before the grand jury to any and all others (including other Service personnel) except as deemed necessary by the attorney for the Government. Under the provisions of Rule 6(e), a knowing violation may be punished as a contempt of court.

.04 As under prior law, disclosure of matters occurring before the grand jury may also be made when so directed by a court preliminarily to or in connection with a judicial proceeding. The Service may use such information for civil purposes upon the issuance of a court order under Rule 6(e) directing disclosure of matters occurring before the grand jury for the purpose of civil liabilities. Granting an order under Rule 6(e) for the release of grand jury information is at the discretion of the judge. Legislative history reflects that the recent amendment to Rule 6(e) is not intended to preclude the use of grand jury-developed evidence for civil law enforcement purposes. As pointed out by the Senate Report, "On the contrary, there is no reason why such use is improper, assuming that the grand jury was

utilized for the legitimate purpose of a criminal investigation."

.05 A court order under Rule 6(e) is applied for by an "attorney for the Government." "Attorney for the Government" is defined by Rule 54(c) to include only "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, (and) an authorized assistant to a United States Attorney." When the terms "attorney for the Government" or "Government attorney" are used herein without further explanation, they refer to the attorney directly involved in the conduct of the Grand Jury proceeding. This does not include Regional Counsel and Chief Counsel Attorneys, but may include Strike Force Attorneys and Criminal and Tax Division Attorneys of the Department of Justice.

.06 There are no restrictions on the use of information or material which may have been presented to or developed by a grand jury when it becomes part of a public record, such as in open court proceedings, or is otherwise available through a source independent of the grand jury. Consonant with these principles, information supplied to the grand jury by the Service from sources independent of grand jury process or leads therefrom may be used for both the criminal purposes of the grand jury as well as the civil purposes of the Service. For example, this would not preclude an Audit Division examination if conducted independent of grand jury information and leads incidental to grand jury information. However, special care should be taken to document sources of information and leads thereto as the Service may bear the burden of proving that evidence used for civil purposes was obtained independent of the grand jury. See Section 4.02.

.07 Because of various problems associated with information developed by state grand juries, this Supplement does not provide procedures for such information. As the access to and use of information developed by a state grand jury depends upon the law

of the particular state involved, Regional Counsel should be consulted for legal advice prior to Service acceptance of such information.

.08 In General, for purposes of tax administration, the Service may disclose returns and return information to the Department of Justice on its own motion, if the case to which the information relates has been referred to the Department of Justice. If the case has not been referred by the Service, disclosure may be made only upon the proper written request of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General. See 26 U.S.C. 6103(h)(3). In a Federal grand jury proceeding involving a matter of tax administration, if either of the above procedures were followed, the Service may disclose returns and return information to Department of Justice attorneys (including U.S. Attorneys) who are personally and directly engaged in, and solely for their use in, preparation for any such proceeding (or investigation which may result in such a proceeding), if one or more of the following conditions are satisfied: the taxpayer whose returns and return information are to be disclosed is or may be a party to the proceeding; the treatment of an item on the return is or may be related to the resolution of an issue in the proceeding or investigation; or the return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in the proceeding or investigation. See 26 U.S.C. 6103(h)(2). In this regard, any taxpayer under investigation by the grand jury is considered to be an individual who is or may be a party to the proceeding.

.09 Service personnel who assist an attorney for the Government do so as assistants to an attorney for the Government rather than as employees of the Service. (See Section 4 for detailed explanation.)

.10 This Supplement incorporates the substance of a memorandum entitled "Interim Grand Jury Guidelines," sent to All Regional Commissioners, all District

Directors, Director of International Operations, and an information copy to all Regional Counsel, from the Assistant Commissioner (Compliance) on September 22, 1977. That memorandum replaced instructions on audit time on grand jury investigations contained in a memorandum dated May 5, 1977, from the Director, Audit Division, to all Assistant Regional Commissioners. (Audit), with information copies to all Regional Commissioners.

.11 This also incorporates the substance of a memorandum entitled "Grand Jury Guidelines — M.T. 9-18 dated October 3, 1977," sent to all Regional Commissioners and Director of International Operations by the Assistant Commissioner (Compliance) on January 24, 1978.

Section 3. Requests for Grand Jury Investigations

.01 Investigations of particular cases or projects may be conducted by means of the administrative process, or by seeking a grand jury investigation. The administrative process is the preferred alternative and all investigations shall be by means of the administrative process unless, in the opinion of the approving officials, seeking a grand jury investigation is necessary and appropriate in the circumstances. A grand jury investigation is considered to be necessary and appropriate in the circumstances where:

1. It is apparent that the administrative process cannot develop the relevant facts within a reasonable period of time, or

2. Coordination of the tax investigation with an ongoing grand jury investigation would be more efficient; *and*

3. The case has significant deterrent potential.

.02 Where it appears that a grand jury investigation may properly be utilized to develop information of violations within the investigative jurisdiction of the Service, the special agent must submit a documented

report (including exhibits) to the Chief, Intelligence Division, containing the following information to the extent possible and appropriate:

1 Identification of the criminal case or cases which is/are considered probable, inclusive of all tax returns at issue, identification of all specific taxpayers involved, identification of the contemplated offenses within the investigative jurisdiction of the Service, and all indications of wrongdoing which reflect such contemplated offenses.

2 The progress of the investigation to date, inclusive of all investigative steps already taken, all evidence already developed, identification of all witnesses interviewed and the testimony of such witnesses, and the status of any administrative summonses issued but not complied with.

3 The reason or reasons why seeking a grand jury investigation is believed to be necessary and appropriate in the circumstances. By way of illustration, and not by way of limitation, facts such as the following may indicate that the administrative process cannot develop the relevant facts within a reasonable time: lack of cooperation by important witnesses; efforts by the taxpayer to impede orderly investigation by intimidation of witnesses; destruction or threat of destruction of records or evidence; the secreting of evidence; and severe time limitations imposed by the statute of limitations.

4 The potential deterrent effect of the anticipated case or cases on an area or areas of noncompliance, together with the reason or reasons for concluding the anticipated case or cases is/are sufficiently significant to tax administration to warrant transferring further investigative responsibility to a grand jury.

5 Recommendations as to testimony and documentary evidence to be sought before the grand jury together with identification of the possible witness or witnesses from whom such testimonial and documentary evidence may be obtainable.

6 Any other factor which in the judgment of the special agent bears upon the recommendation for grand jury investigation.

.03 In the event of Service-generated information relating to a case or project which merits grand jury investigation, the special agent will prepare a written report in accordasnce with Section 3.02, for the concurrence of the Chief, Intelligence Division, and the District Director. Prereferral advice should be sought from Regional Counsel prior to starting the report. If approved by the Chief, Intelligence Division, and the District Director, the report will be referred to the Regional Commissioner for concurrence. If approved, this report will be forwarded to Regional Counsel. If approved, the report will be forwarded to the Tax Division, Department of Justice, for appropriate action. If Counsel does not agree with the Service recommendation for grand jury investigation, the matter may be reffered by the Regional Commissioner to the Director, Intelligence Division, for further consideration and possible referral to the Director, Criminal Tax Division. If the matter is referred to the Director, Criminal Tax Division, and he/she agrees with the Regional Commissioner, then the Director, Criminal Tax Division, will forward the report to the Tax Division, Department of Justice, for appropriate action. If the Director, Criminal Tax Division, does not agree with the recommendation, his/her decision will be final. (See Attachment 1.)

.04 Until the Regional Counsel, Mid-Atlantic Region, activates the office of District Counsel, Office of International Operations, the referral chain for the Office of International Operations will be from the Chief, Intelligence Division, to the Director of International Operations, to the Assistant Commissioner (Compliance), to the Director, Criminal Tax Division. In the event the Director, Criminal Tax Division, does not concur in the recommended referral, the Assistant Commissioner (Compliance) may refer the matter to the Deputy Chief Counsel (General), whose decision as to

whether he/she will refer the matter to the Department of Justice will be final. (See Attachment 2.)

.05 In instances where the requested grand jury investigation is likely to result in investigation of taxpayers in more than one region, the Regional Commissioner (if in concurrence) will forward the report directly to the other Regional Commissioner(s) affected. The latter Regional Commissioner will forward the report to the Assistant Commissioner (Compliance) with his/her concurrence or nonconcurrence. If the Regional Commissioners do not agree on the merits of a grand jury investigation, the Assistant Commissioner (Compliance) will make the decision. If approved by the Assistant Commissioner (Compliance), the report will be forwarded to the Director, Criminal Tax Division, for concurrence. If the Director, Criminal Tax Division, concurs, he/she will forward the report to the Tax Division, Department of Justice. In the event the Director, Criminal Tax Division, declines a multiple region grand jury investigation, the Assistant Commissioner (Compliance) may request further consideration by the Deputy Chief Counsel (General). If the matter is referred to the Deputy Chief Counsel (General) and he/she agrees with the Assistant Commissioner (Compliance), then the Deputy Chief Counsel (General) will forward the report to the Tax Division, Department of Justice, for appropriate action. If the Deputy Chief Counsel (General) does not agree with the recommendation, his/her decision will be final. (See Attachment 3.)

.06 In the event reports recommending grand jury investigation as described in 3.03 through 3.05 are not approved, the case or project will be returned through channels and completed through Service processes.

.07 Occasionally Government attorneys may wish to disclose directly to Service personnel information from a grand jury investigating nontax criminal matters. Service personnel are authorized to review such information only with prior approval of the Chief,

Intelligence Division. In this instance the following procedures will be observed:

1 The Chief, Intelligence Division, or his/her delegate will first determine whether it is the Government attorney's desire to investigate by grand jury the possible commission of crimes within the investigative jurisdiction of the Service if the information so warrants. If not, Service employees may review the proffered information *only* if the Government attorney obtains a Rule 6(e) order releasing the information from the grand jury secrecy provisions and permitting its use for the tax administration purposes of the Service, both criminal and civil. Information governed by IRC Section 6103 will *not* be disclosed to the Government attorney.

2 If the Government attorney desires to investigate by grand jury possible commission of crimes within Service jurisdiction, the Chief, Intelligence Division, will not take any further action unless or until a written authorization is obtained from the Government attorney specifically naming the Chief and, where appropriate, his/her delegate as persons being requested to assist said attorney. Upon receipt of such authorization, the Chief, Intelligence Division, or his/her delegate may then review and analyze the grand jury information as to its criminal tax potential. Any such review will take place in the Government attorney's office. The person who reviews the grand jury information shall not disclose it to any person not named in the Government attorney's authorization. Under *no* circumstances will documents, reports or other grand jury information, or copies thereof, be removed from the office of the Government attorney.

3 Upon completion of such a review, the Chief, Intelligence Division, will advise the Government attorney whether or not he/she believes that Service assistance to a grand jury is warranted in accordance with IRM 9311.2 as well as the standards set forth in Section 3.01 above. However, the Chief, Intelligence Division, may not disclose any Section 6103 material.

4 In the event the Chief, Intelligence Division, believes that the grand jury information indicates a potential criminal tax offense(s) meritorious of investigation, the Chief will explain to the Government attorney that approval to commit Service resources may be sought in one of the following two ways:

a Direct referrals from the Chief, Intelligence Division, through Service channels (see Section 3.076 through 3.0712); or

b Referrals from the Government attorney through the Department of Justice for transmittal to the Service (see Sections 3.0713 through 3.0715).

5 The Chief, Intelligence Division, will also advise the Government attorney that regardless of the route used to request Service assistance, final approval must be made by the Regional Commissioner and the Regional Counsel (or alternatively when multi-regional aspects are involved, the Regional Commissioners, the Assistant Commissioner (Compliance) and the Director, Criminal Tax Division) before Service resources are committed to a grand jury investigation. The only exception with regard to final approval is when the above management officials disagree as to the use of the grand jury process. Then, the Regional Commissioner and the Assistant Commissioner (Compliance) (in multi-regional requests) may request further consideration of the matter using the same procedures as described in Sections 3.03 and 3.05 for Service-generated request for grand juries. The Chief, Intelligence Division, may pr. vide a copy of this Supplement to the attorney for the Government for his/her information.

6 If the Government attorney chooses to request Service assistance through Service channels, the Chief, Intelligence Division, will secure in writing the Government attorney's authorization in accordance with Rule 6(e) to disclose the grand jury information to Service employees as described in this Supplement, for the

purpose of further evaluation and possible commitment of Service resources to a recommended grand jury investigation. The Government attorney's written approval should, to the extent possible, give the proper names and titles of these persons to whom grand jury information is to be disclosed together with authority for the approving official to make any additional disclosure he/she deemes necessary to assist in the evaluation of the request. Disclosure of grand jury information to members of such persons' staff should be made only when necessary to carry out the procedures in this Manual Supplement. Generally, disclosure of grand jury material outside of the district Intelligence Division should be limited to the District Director, Regional Commissioner, Assistant Regional Commissioner (Intelligence), Secretary for the Assistant Regional Commissioner (Intelligence), Regional Counsel, Assistant Regional Counsel (Criminal Tax) and the Secretary for the Assistant Regional Counsel (Criminal Tax). If disclosure is necessary to persons in accordance with this Supplement who are not specifically named in the Government attorney's written authorization, the names of such additional persons should immediately be supplied in writing to the Chief, Intelligence Division, for transmittal to the Government attorney. These requirements apply to names of managerial, technical and secretarial personnel. Anyone to whom such disclosure is made shall be informed of the strict secrecy provisions of Rule 6(e).

7 In the event the Chief, Intelligence Division, or his/her delegate believes a grand jury investigation is warranted and the attorney for the Government requests that the Service initiate consideration of a recommendation for grand jury investigation, a summary of the grand jury facts will be prepared. This fact sheet should list each fact in numerical order to facilitate subsequent comparisons with returns and return information filed with or independently developed by the Service. No reference to any material derived from return and return information filed with or

independently developed by the Service should be included in the summary. This summary of grand jury facts will be prepared in an original and three copies. Service employees will *not* make any other copies of the summary.

8 The Chief, Intelligence Division, or his/her delegate will also prepare in numerical order a separate summary of pertinent returns and return information filed with or independently developed by the Service. This summary will be prepared in an original and three copies. This fact sheet, when compared to the grand jury fact sheet, will disclose the potential criminal tax violations within the investigative jurisdiction of the Service. These two summaries (fact sheets), numbered numerically by paragraph, will facilitate cross-referencing in the Chief's transmittal memorandum.

9 The Chief, Intelligence Division, will transmit to the District Director the original and two copies of the grand jury summary, the summary of return information and the letter from the Government attorney authorizing disclosure. The Chief should keep one copy of all the materials forwarded. If the District Director concurs, he/she will forward the completed package to the Regional Commissioner. If the Regional Commissioner concurs, the completed package will be forwarded to Regional Counsel. If in concurrence, Regional Counsel will keep one copy of the package and refer the original and one copy to the Tax Division of the Department of Justice. If the Regional Commissioner concurs with the request but Regional Counsel does not, the Regional Commissioner may follow the referral procedures in Section 3.03 if he/she desires further consideration of the matter. (See Attachment 4.) Neither the District Director nor the Regional Commissioner will keep copies of the grand jury summary. If the request affects more than one region, see Section 3.05 for instructions regarding the routing of the request. (See Attachment 5.) If the procedures in Section 3.03 (relating to the Regional Commissioner forwarding

the request to the National Office), Section 3.04, or 3.05 are followed, the grand jury summary will be retained only by the Chief Counsel official referring the matter to the Tax Division of the Department of Justice.

10 The transmittal from the Chief, Intelligence Division, transmitting the material and all subsequent transmittals will include the names of all Service employees to whom any grand jury information has been disclosed. These names should coincide with the names of Service employees included in the Government attorney's written approval as well as those supplied to the Government attorney pursuant to Section 3.076.

11 In the event the request for grand jury assistance is declined by any approving official, the original and *all* copies of the grand jury fact sheets will be returned to the Chief, Intelligence Division, who *must* return the original and all copies to the Government attorney. If declined by the Department of Justice, the two copies in possession of the Service must be returned to the Government attorney. Absent authorization under IRC 6103, no information available to the Service from sources independent of the grand jury which constitutes return or return information may be disclosed to the Government attorney. Therefore, it is imperative that grand jury information be strictly segregated, including all discussions which would reveal grand jury information particulars, from all non-grand jury information to facilitate the return of the grand jury information without disclosing material derived from tax returns and tax return information filed with or independently developed by the Service. During discussions with the Government attorney regarding the Service's determination to decline to render grand jury assistance, care should be taken to avoid any reference to information acquired solely as a result of access to returns and return information in the possession of the Service.

12 If the Government attorney is not satisfied with the Service's decision in Section 3.0711 that the grand

jury information, when compared to information contained in the Service's files, does not warrant the Service's assistance, he/she should be informed that such information governed by IRC 6103 may be disclosed only in accordance with a lawful request by the Assistant Attorney General, Tax Division, under the provision of IRC 6103(h)(3)(B) when made for tax administration purposes.

13 Alternatively, the following procedures may be followed at the discretion of the Government attorney. The Government attorney may request the Chief, Intelligence Division, to review and analyze grand jury information as to its criminal tax potential and advise whether he/she believes Service assistance to a grand jury is warranted. If so, the Chief, Intelligence Division, should follow the procedures in Section 3.072 and 3.073. The Government attorney may submit a report to the Tax Division of the Department of Justice requesting Service assistance to a grand jury. If the Government attorney decides to refer the matter to the Tax Division, the Chief, Intelligence Division, will provide to the Government attorney the names and titles of those Service officials and their staff personnel who must review the request as stated in Section 3.0714 or 3.0715 below. The Government attorney should be requested to attach to the report a written authorization to disclose grand jury information to those specific Service personnel plus authority to disclose to any additional Service personnel who are necessary to assist in the evaluation of the request. If the Assistant Attorney General, Tax Division, concurs he/she will refer the report to the Director, Criminal Tax Division.

14 The Director, Criminal Tax Division, will then refer the report to the Director, Intelligence Division, for transmittal to the appropriate Regional Commissioner. He/she will transmit the report to the District Director and Chief, Intelligence Division, for evaluation and recommendation purposes. The Chief, Intelligence Division, will prepare a summary of the grand jury facts and a summary of pertinent returns and return

information filed with or independently developed by the Service as described in Sections 3.077 and 3.078, respectively. The referral procedures and transmission and retention of these summaries should be in accordance with Section 3.079. (See Attachment 6.0 If the request is declined by someone with authority to reject the request (see Section 3.079) the declination memorandum, along with all copies of the grand jury summaries and the report and request from the Department of Justice should be returned to the Director, Criminal Tax Division, who will advise the Department of Justice of this decision and return all grand jury information, including the summaries to the Tax Division. The District Director, Regional Commissioner and the Regional Counsel will notify the Government attorney in accordance with Section 3.076 if members of their staff not specifically named in the Government attorney's written authorization for disclosure need to review the grand jury material.

15 If the Government attorney's request in Section 3.0713 pertains to taxpayers in more than one region, the Director, Intelligence Division, will transmit the report to the Regional Commissioner in whose region the grand jury is located. That Regional Commissioner will transmit the report to the District Director and Chief, Intelligence Division, in whose district the grand jury is located. The Chief, Intelligence Division, will then follow the procedures in Section 3.077 and 3.078 regarding preparation of grand jury and non-grand jury fact summaries. The referral procedures and transmission and retention of fact summaries should be in accordance with the provisions of Section 3.079 and 3.05 regarding multi-regional requests. (See Attachment 7.) Regional Counsel will not be consulted in multi-regional requests. No copies of the grand jury fact summaries will be retained by anyone except the Chief, Intelligence Division, and the Director, Criminal Tax Division. If the request of the Department of Justice is declined, the procedures in Section 3.0714 regarding notification to the Department of Justice and return of grand jury information will be followed.

16 Once a grand jury request has been approved by Service and Justice officials, Service resources will only be utilized for the purpose described in the request. For example, if the Government attorney's request related to the investigation of X and Y and, during the investigation, the grand jury developed information which indicated a possible tax violation by Z, the Government attorney could not utilize the resources of the Service to investigate Z, unless he/she first makes a request relating to Z in accordance with Sections 3.076 through 3.0712 or 3.0713 through 3.0715 and obtains appropriate Service and Justice approval.

17 Controls relating to Service resources who assist in the grand jury investigation are discussed in Section 4.

.08 Any page of a report or other documentation which contains information governed by the grand jury secrecy provisions should indicate by rubber stamp in the top right corner the following: "CAUTION: THIS PAGE CONTAINS SECRET GRAND JURY INFORMATION."

Section 4. Responsibilities and Procedures

.01 After the Service has referred a case or cases for grand jury investigation in accordance with any of the procedures in Section 3, and upon the request by the attorney for the Government for assistance, the District Director and Chief, Intelligence Division, will determine the Service personnel who will be assigned to assist the attorney for the Governemnt. Prior to the time that any such personnel receive any grand jury information, there should be a written request made by the attorney for the Government specifically listing the names of each Service employee whose assistance is being requested. This list will include names of all managerial, investigative, and secretarial personnel who will necessarily have access to grand jury information. The list will include an Intelligence group manager and the Chief, Intelligence Division. The District Director will not be included on this list unless he/she and the

attorney for the Government determine that it is essential for him/her to carry our his/her responsibilities regarding personnel who are assisting the attorney for the Government. If, during the course of a grand jury investigation, the attorney for the Government requests the assistance of additional Service employees or the assistance of Regional Counsel, and the Service and/or Regional Counsel agree to provide such assistance, the attorney for the Government should make a written request listing the names of such employees. No Service employees who are not specifically listed in the written requests of the attorney for the Government pursuant to this Section will have access to grand jury information. This means that those Service officials authorized disclosure in Section 3 are not authorized to have additional grand jury information once Service personnel start providing assistance, unless their names are listed in a written request of the attorney for the Government pursuant to this Section. In addition, see Section 7 with regard to those individuals who may review the report prepared at the conclusion of the grand jury investigation.

.02 To prevent doubt about the origins of information available for civil use, information in the possession of the Service prior to the receipt by Service personnel of any grand jury information must be identified by preparing a comprehensive record, with appropriate indexes and descriptions prior to the receipt of grand jury information. Thereafter, any related information obtained by the Service apart from grand jury information should similarly be recorded and its independent source specified. Should it become necessary to make a civil assessment or to solicit consents after the initiation of the grand jury investigation, only non grand jury information may be used in the absence of a Rule 6(e) order which authorizes the use of grand jury information for civil purposes.

.03 Service personnel who have received grand jury information that is subject to the secrecy provisions of

Rule 6(e) shall, exclude themselves from involvement in non grand jury matters concerning the individuals, entities, and subject matter of the grand jury information. This provision applies to employees of the Service, including those at the highest management levels. The exclusion from, any involvement applies to all activities including investigative and management functions. Service officials having primary responsibility for both civil and criminal tax matters such as District Directors and Regional Commissioners should maintain a confidential list of matters wherein they have had access to grand jury information and should exclude themselves from personal involvement concerning such matters in non grand jury civil and criminal cases. Responsibility for such non grand jury cases should be delegated to subordinates. It is understood that Chief Counsel's office will be issuing similar instructions. The Chief, Intelligence Division, and Intelligence Division group managers may not use secret grand jury information in directing a non grand jury investigation.

.04 Information disclosed to or developed by IRS personnel while assisting an attorney for the Government in connection with a grand jury generally constitutes grand jury information governed by the secrecy provisions of Rule 6(e). All grand jury information (including any copies, summaries, workpapers, etc.) is to be returned to the attorney for the Government when it is no longer needed for use in assisting the Government attorney in the investigation of the matter under consideration. If such information has become available to the Service independent of the grand jury by virtue of a public trial or other judicial proceedings or an order under Rule 6(e), the Service should then obtain the information from the public record or pursuant to a Rule 6(e) order.

.05 An Intelligence group manager will be assigned to all grand jury approved investigations. See also Section 4.03.

.06 The Chief, Intelligence Division, will conduct periodic reviews, at least quarterly, with the group manager assigned to the grand jury to assure that Service resources should continue to be committed to the grand jury investigation.

.07 Service employees assisting the attorney for the Government may not use the IRS Administrative Summons (Form 2039) under any circumstances. In addition, Internal Revenue Service Document Receipt, (Form 2725), will not be used when securing documents pursuant to a grand jury subpoena.

.08 Service procedures relative to district conferences in IRM 9356 do not apply.

.09 Service procedures relative to giving subjects Miranda-type warnings in IRM 9384 do not apply. The attorney for the Government will provide necessary instructions concerning any required warnings.

.10 While acting as assistants to the attorney for the Government, Service personnel may use their official Service credentials for identification purposes only. When exhibiting their credentials, they must advise that they are acting as assistants to the attorney for the Government in conjunction with the grand jury, and not an IRS investigation.

.11 While acting as assistants to the attorney for the Government, neither special agents nor revenue agents may solicit or seek information for other than criminal purposes.

.12 Information to assist the attorney for the Government will usually be obtained by the agents assigned to the grand jury. However, if any information is to be obtained by a collateral request, the Intelligence group manager assigned to assist the grand jury should first obtain a written approval of the Government attorney. The collateral request should clearly state that it is part of a grand jury investigation governed by the secrecy provisions of Rule 6(e). Any information supplied by the replying district which is governed by IRC Section 6103

may be disclosed only in accordance with Section 2.08 of this Supplement. Transmittal memorandums should be used in responding to a request and should include the names and titles of Service personnel who assisted in the reply and to whom grand jury information was disclosed. Upon receipt of the reply, a written list of such Service personnel will be given to the attorney for the Government. The attachments to the transmittal should include all copies of the requested information and the collateral request itself. No copies of the transmittal or attachments should be retained by the replying district.

.13 Physical facilities should be utilized which provide adequate security for grand jury information. Materials should be kept in a separate work area inaccessible to other Service personnel not assisting the grand jury.

.14 No information documents, e.g., Form 3949 (Intelligence Information Item), may be prepared which contain grand jury information, absent a Rule 6(e) order.

.15 Service personnel are directed to continue to observe Service guidelines regarding crimes that may be investigated by IRS agents, notwithstanding any greater authority of the grand jury. For example, Service personnel are authorized to investigate only violations of Title 26, Title 18 (in contravention of the Internal Revenue Code) and properly authorized Title 31 investigations.

.16 The Intelligence Division may utilize Transaction Code 914 (IRM 9326) to establish control of the tax periods under investigation by the grand jury. However, this should be done only with the approval of the Government attorney.

.17 With regard to the use of monitoring and other investigative devices, the general instructions in IRM 9389.1 should be followed. With respect to IRM 9389.2, Consensual Monitoring of Telephone Conversations, if

the Government attorney requests the monitoring of telephone conversations with the consent of one or all parties, a request should be prepared in accordance with IRM 9389.2:(2) and should be approved by the Chief, Intelligence Division. If he/she is not available, the Acting Chief or the District Director may approve the request provided he/she has been authorized to have grand jury material disclosed to him/her by the Government attorney. With regard to IRM 9389.2:(4), the report should be prepared for the Government attorney. In order that the Service may properly respond to any request from the Department of Justice relating to electronic surveillance, the Chief, Intelligence Division, should request a written disclosure authorization from the Government attorney for the Director, Intelligence Division, and his/her staff so that the Director, Intelligence Division may be provided the information contained in IRM 9389.2:(4)(a)(b) and (i). No other information should be provided to the Director, Intelligence Division, and it should be noted that the information in IRM 9389.2(4)(b) is grand jury information. If IRM 9389.2:(5) is appropriate, the report should not contain any grand jury information. The Director, Intelligence Division, will notify the Chief, Intelligence Division, of the names of staff members who will have access to the grand jury information for notification to the Government attorney. With respect to the procedures in IRM 9389.3, Consensual Monitoring of Non-Telephone Conversations, the Chief, Intelligence Division, will forward the request directly to the Director, Intelligence Division, for his/her approval, with written authorization for disclosure to the Director by the Government attorney. The Chief, Intelligence Division, will advise the District Director and the Assistant Regional Commissioner (Intelligence) that the Government attorney requested a consensual monitoring of telephone conversations, which he/she concurred with and that the request was forwarded directly to the Director, Intelligence Division. With regard to the report required by IRM 9389.3:(2), the

procedures above for consensual monitoring of telephone conversations should be followed.

.18 Any information provided to the grand jury by an informant is grand jury information and cannot be included in Service files or disclosed to Service personnel not assisting the grand jury, even if the informant is also considered a "controlled informant" for the Service in accordance with IRM 9373. If a special agent, group manager, or Chief, Intelligence Division, is requested by the Government attorney to direct the activities of the informant, that Service employee should follow the procedures in IRM 9373.3:(3) and 9373.3:(4). Any violations of instructions and law by informants should be reported immediately to the Government attorney. If the Government attorney requests that the Service make a payment to or on behalf of an informant, the Chief, Intelligence Division, will request written disclosure authorization from the Government attorney for the Service official responsible for approving the request. See IRM 9372.2. The written request for authority to make confidential expenditures should be in accordance with IRM 9372.2:(8) and should state that the request is based on grand jury information and should not be disclosed to individuals not authorized by the Government attorney.

Section 5. Audit Division Responsibilities

.01 Grand jury information may be used in civil matters only if a Rule 6(e) order specifically allows the use of grand jury information for the purpose of civil liabilities. Therefore, the assistance of Regional Counsel should be sought to determine the scope of the Rule 6(e) order. For example, some orders may provide that the information is released to Service personnel for civil and criminal purposes and further provide that the information will remain under the aegis of a Government attorney. This does not allow use of this information for either a civil or criminal investigation conducted by "administrative process."

.02 If the Audit Division has an examination in process at the time a grand jury investigation starts, either as part of a joint investigation with the Intelligence Division or as an independent examination, the Audit Division will maintain control of the original tax returns as well as have responsibility for the solicitation of civil consents. This applies to those years under investigation by the grand jury and any other years Audit may have under examination.

.03 However, in the absence of a Rule 6(e) order which permits civil use of grand jury evidence, the Audit Division will not have access to or use grand jury information for civil purposes. Thus, in those cases above, absent a Rule 6(e) order, consents may only be solicited based on information obtained wholly independent of the grand jury's investigation.

.04 The fact that grand jury information is known to Service personnel who are assisting the grand jury investigation is not an automatic bar to solicitation of consents or an examination of a return if information obtained independent of the grand jury exists which would justify the solicitation of a consent or the examination of a particular return. However, consideration for initiation of an examination or soliciting a consent under these circumstances should be pursued only when such action is clearly warranted. For returns selected because of information obtained independent of the grand jury indicating the possible existence of tax consequences, consents could be solicited or an examination conducted by a revenue agent other than the one assisting the grand jury. In such cases the Audit Division will maintain control of the original tax returns unless the tax returns have already been requisitioned and obtained by the Intelligence Division. If the Audit Division is involved in a civil case that is also the subject of a grand jury investigation and makes a determination to solicit consents, issue a statutory notice, or make an assessment on the basis of non grand jury information, the Chief, Audit Division, will make his/her recommendation to the District

Director or, in the event that the District Director is excluded under Section 4.03, to the Assistant District Director. In those instances where there is no Assistant District Director, the ultimate determination will be made by the Assistant Regional Commissioner (Audit) or someone designated by the Regional Commissioner who has had no access to grand jury information relating to the taxpayer. The person making the ultimate decision regarding whether or not to proceed with the civil aspects of a case will also be furnished with the opinion of the Chief, Intelligence Division, as to whether to proceed with the civil action. The Chief, Intelligence Division, will first discuss the matter with the Government attorney. If the Government attorney gives sufficient written reasons that civil action would jeopardize the criminal case and the Chief, Intelligence Division, in accordance with policy statement P-4-84 believes that the criminal actions should take precedence over the civil aspects and that no civil action should be taken, this recommendation will be made. The Chief, Intelligence Division, will not disclose any grand jury information which forms the basis for his/her determination. The District Director, Assistant District Director, Assistant Regional Commissioner (Audit), or someone designated by the Regional Commissioner will make the decision regarding the appropriate civil action. The determination of the District Director, Assistant District Director, Assistant Regional Commissioner (Audit) or someone designated by the Regional Commissioner in this instance will be final.

.05 In those cases where there has not been any involvement by the Audit Division prior to the start of the grand jury's investigation, and the criteria as stated in the preceding paragraph has not been met to permit solicitation of consents or the examination of a return and a Rule 6(e) order has not been obtained, the Intelligence Division will maintain control of the tax returns. This applies even if a revenue agent is assigned to provide technical assistance. In such cases, neither

the Audit Division nor the Intelligence Division will be responsible for the civil statutes relative to those years under investigation by the grand jury.

.06 The District Director, or his/her designate if the District Director must exclude himself/herself pursuant to Section 4.03, may wish to continue to the independent civil examination concurrently with the grand jury investigation. In those instances, a revenue agent assigned to the civil examination shall continue the civil examination and not be assigned to the grand jury investigation. Revenue agents and any other Audit personnel who assist the Government attorney will not subsequently be assigned to work civil cases related to that grand jury investigation.

.07 Details to grand juries.

1 Audit examiners, group managers, or reviewers involved in grand jury investigations will be detailed to the Intelligence Division for the time required to perform such duties. During the duration of such detail said personnel will work exclusively as assistants to the attorney for the Government and will not be involved in any non grand jury activities.

2 The Audit Division will be advised of the type of cases and difficulty of work to be performed by the detailees. For this purpose, information will be conveyed to Audit Division management in general terms in order to assign employees of appropriate experience without revealing grand jury information.

3 If it is deemed to be in the interest of effective management and the attorney for the Government requests, the district may designate an Audit manager or reviewer to assist examiners in grand jury investigations. Because of the need for security of information obtained by the grand jury, extreme care must be exercised by the participating agents, group managers, or reviewers with respect to the use of the information obtained. When their details are terminated, such Audit personnel will not be assigned to the civil aspects of the grand jury cases.

4 If the attorney for the Government deems it necessary that disclose be made to a group manager, or reviewer, the group manager or reviewer can discuss with the agent case material obtained by that grand jury as part of their evaluation and advisory duties.

5 All time spent by examiners, reviewers, or group managers on grand jury investigations will be charged to Activity Code 815 — Details to the Intelligence Division.

Section 6. Employee Plans and Exempt Organizations (EP/EO) Division Procedures

.01 The preceding instructions and guidelines that apply to the Audit Division also apply to the EP/EO Divisions.

.02 Any reference to the Audit Division or to revenue agent will also apply to the EP/EO Divisions or to EP/EO specialists.

.03 Time spent by EP/EO specialists on Grand Jury Investigations will be charged to Activity Code 826 — All Other (Details). EP/EO reviewers will also use Activity Code 826 for time spent reviewing or providing technical assistance on those cases.

Section 7. Reports and Review of Matters Which Include Grand Jury Information

.01 A report, similar in content to a special agent's final report, should be prepared and addressed to the attorney for the Government upon the conclusion of the grand jury investigation. The report, whether with or without prosecution recommendation, is to be transmitted to designated Regional Counsel attorneys. Prior to transmitting the report to the Regional Counsel attorneys who will review the report, those attorneys and necessary secretarial personnel will be identified and a written request from the Government attorney naming such individuals to assist him/her will be obtained. Documents governed by the secrecy provisions of Rule 6(e) should be bound in exhibit folders

separate from all other documents and clearly identified so as to facilitate subsequent identification of the source of documents. Copies of the report will not be supplied to the District Director or to any persons not specifically authorized by the attorney for the Government as his/her assistants.

.02 The Chief, Intelligence Division, when the tax consequences warrant, will ask the Government attorney to request a Rule 6(e) order for civil purposes in the following circumstances:

1 when a grand jury declines to return a true bill and the case is closed by the Department of Justice;

2 upon acquittal of the taxpayer or dismissal of the indictment, unless appeal is pursued;

3 following sentencing of the taxpayer, after a guilty or nolo contendere plea; or

4 when the taxpayer is convicted upon trial, following exhaustion of appeal; except in those instances where the special agent can certify that significant civil liabilities are at stake and that the statute of limitations poses an imminent problem, at the conclusion of the sentencing of the taxpayer. The Chief, Intelligence Division, may ask the attorney for the Government to secure a Rule 6(e) order for civil purposes at any stage of the criminal proceedings following indictment, provided that he/she can demonstrate that significant civil liabilities would be substantially prejudiced. Such cases will be given consideration on a case-by-case basis by the Department of Justice. It is anticipated that the seeking of a Rule 6(e) order prior to a plea or trail will be permitted only in extraordinary cases.

.03 Where cases have civil potential solely on the basis of non grand jury information and a Rule 6(e) order could not be obtained, the Chief, Intelligence Division, should transmit to the Chief of the appropriate function by memorandum, all non-grand jury information. The transmittal should not refer to the grand jury involvement nor refer to or draw conclusions based on grand jury information. All grand jury

information should be returned to the Government attorney no later than this time by the official in custody of the information. If a Rule 6(e) order authorizing full disclosure for civil purposes has been obtained, the Chief, Intelligence Division, should forward a copy of the special agent's report and supporting documents to the appropriate function.

Section 8. Effect on the Intelligence Case Management and Time Reporting System

.01 The Service may recommend grand jury investigation on either particular cases or projects as described in Section 3.02. In such instances, the pertinent Form(s) 4930 (Intelligence Case/Project Record) will not be updated to indicate district disposition until approval of the request by Regional Counsel and the Department of Justice. Upon approval enter the date of the approval by the Department of Justice in Item 37 and the number "98" in Item 38. No entries are to be made in Items 41 through 80 until a determination has been made by the grand jury regarding the disposition of case, e.g., the grand jury returns an indictment or prosecution is declined. In the event of an indictment, enter Code "4" (direct referral to U.S. Attorney) in Item 41, Code "2" (subject indicted), in Item 59, and the date in Items 42 and 60. Further update Form 4930 as fully as possible so long as the information is not governed by grand jury secrecy rules. In the event the matter is terminated without indictment, enter Code "1" in Item 41, the date of that action in Items 42 and 80, and the reason closed in Item 79.

.02 With respect to requests initiated by the Department of Justice for IRS assistance to a grand jury investigation, upon final approval by the Department of Justice, a Form 4930 will be prepared. Only Items 1, 16 or 17 (as appropriated), 23, 24, 26, 33, 34, 35, 36, 37, 38, and 40 will be completed. If the subject's name is governed by the grand jury secrecy, Item 1 should show some unique designation, such as Grand Jury No. 1, S.D., N.Y., for the proper accounting of time. Enter the

date of the approval in Item 37 and number "98" in Item 38. No entries are to be made in Items 41 through 80 until a determination has been made by the grand jury regarding disposition of the matter, e.g., the grand jury returns an indictment or prosecution is declined. In the event of an indictment, enter Code "4" (direct referral to U.S. Attorney) in Item 41, Code "2" (subject indicated) in Item 59, and the date in Items 42 and 60. Further update Form 4930 as fully as possible so long as the information is not governed by the grand jury secrecy provisions. In the event the matter is terminated without indictment, enter Code "1" in Item 41, the date of that action in Items 42 and 80, and the reason closed in Item 79.

.03 Forms 4930 should be updated when information becomes available which is not governed by the grand jury secrecy provisions. Conversely, information should in no circumstance be entered into the management information system if such information is governed by the grand jury secrecy provisions. For example, in the instance of a project, cases will not be numbered as situations are identified through grand jury processes involving a criminal violation by individuals or corporations unless they are designated by a unique designation. In the event such individuals are indicted by a grand jury, Form 4930 should be prepared or updated containing all information not governed by the grand jury secrecy provisions.

.04 The majority of the procedures in Sections 8.01 through 8.03 above were incorporated into IRM 9570, Case Management and Time Reporting System Handbook, by Manual Transmittal 9570-13, dated May 17, 1978. Manual Transmittal 9570-15 is being issued concurrently with this Supplement to incorporate the procedures above that were not included in MT 9570-13.

Section 9. Effect on other Documents

.01 This supersedes Manual Supplement 9G-61, CR 42G-368 and 45G-286, dated July 29, 1977, and Manual Supplement 9G-66, CR 42G-374 and 45G-291, dated

November 11, 1977, but the CR (10)1G-47 is not affected. Annotations to MS 9G-66 at IRM 9267, to MS 9G-61 at IRM 9311.3, and to MSCR 45G-286 at IRM 4530, 4540, and 4565, are being removed and replaced by references to this Supplement and its "Effect."

.02 This obsoletes Sections 4.01, 4.03 through 4.14, and Section 5, and supersedes Section 14 of Manual Supplement 9G-9, CR 41G-112 and 5G-31 (renumbered from CR 51G-146). This "Effect" should be annotated by pen and ink on the Manual Supplement cited, with a reference to this Supplement.

.03 This amends IRM 4530, 4540 and 4565.

.04 This amends and supplements IRM 9266 and 9267.

.05 This supplements IRM 7(10)00, 9264.1, 9311.3, 9326.1, 9363.4:(5), 9373, 9389.2, 9389.3, 9512.3, 9540, and 9634.

.06 This amends and supplements 7(14)2 of IRM 4235, Techniques Handbook for In-Depth Audit Investigations, and supplements (10)70 of IRM 1272, Disclosure of Official Information Handbook. This "Effect" should be annotated by pen and ink beside the text cited, with a reference to this Supplement.

Jerome Kurtz, Commissioner (6-23-78).

Appendix B

United States Court of Appeals, Fourth Circuit.

Nos. 78-1335, 78-1336.

In re GRAND JURY SUBPOENAS, APRIL, 1978, AT BALTIMORE.

Argued July 21, 1978.

Decided Aug. 3, 1978.

As Amended Aug. 17, 1978.

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and HALL, Circuit Judge.

WINTER, Circuit Judge:

A corporation, currently under investigation by a federal grand jury for possible federal income tax violations, appeals from an order of the district court denying its motion to quash eight grand jury subpoenas and to terminate the grand jury proceedings. Alternatively, the corporation seeks a writ of mandamus directing the district court to hold an evidentiary hearing into allegations that the grand jury process has been abused by the Internal Revenue Service (IRS) and the Justice Department.[1]

Because we are of the opinion that the district court's order is not a final decision within the meaning of 28

[1] The life of the grand jury to which these proceedings relate has not expired and it has not concluded its deliberations. In order to preserve the secrecy of its proceedings, we will hereafter refer to the corporation which is the subject of its inquiry as "petitioner."

U.S.C. § 1291, we dismiss petitioner's appeal (No. 78-1336) for want of jurisdiction. As to the mandamus petition (No. 78-1335), we dismiss on the merits. We are not persuaded that petitioner has alleged a case of sufficient substance to warrant an evidentiary hearing or to entitle it to the writ.

I.

After actively auditing petitioner's tax returns for more than seven years,[2] the Intelligence Division of the IRS, in May, 1977, initiated a criminal investigation of petitioner's tax returns for the years 1971-1975.[3] At some point prior to April, 1978, the decision was made to discontinue the administrative investigation into petitioner's possible criminal liability and to rely instead on the investigatory powers of the federal grand jury.[4] The decision to resort to a grand jury was made at or about the time that petitioner was successful in resisting judicial enforcement of several administrative summonses, but the record does not establish whether before or after. The grand jury investigation is currently proceeding, with five IRS agents who were previously involved in the administrative investigation (including one that has also been involved in the civil audits) now assisting the government attorney responsible for the grand jury investigation.

On April 11, 1978, the clerk of the district court, upon application of the government, issued eight subpoenas

[2] The civil audit of taxable years 1967-1972 resulted in a deficiency notice, which petitioner is currently challenging in United States Tax Court. The civil audit of taxable years 1973-1975 is ongoing.

[3] A prosecution for fraud, if any, for the taxable year 1971 will be barred by limitations unless instituted before an undisclosed date in September, 1978, *See* 26 U.S.C. § 6531.

[4] The principal factual dispute between petitioner and the government concerns the government's motives for abandoning the administrative investigation in favor of a grand jury investigation. This dispute will be discussed in Part III of this opinion.

to secure certain documents believed to be in the possession of petitioner. Shortly thereafter petitioner moved to have the subpoenas quashed and the grand jury proceedings terminated. Alternatively, petitioner sought a protective order prohibiting disclosure of grand jury materials to the IRS. Petitioner charged that the government was improperly using the broad powers of the grand jury to obtain documents and records, otherwise unobtainable through the administrative process, desired by the IRS for civil purposes and its administrative criminal investigation.

After hearing the parties' arguments *in camera* and receiving a sworn affidavit attesting to the government's good faith in conducting the grand jury investigation,[5] as well as assurances that the IRS agents participating in the investigation realized that disclosure without a court order was prohibited by F.R. Crim. P. 6(e)(2)(B),[6] the district court denied relief. Proceedings in this court follows.[7]

II.

We consider first the basis on which the case is before us.

[1] For an appeal properly to lie, the order of the district court must constitute a final decision under 28 U.S.C. § 1291, or come within the several exceptions as to interlocutory decisions enumerated in 28 U.S.C. § 1292. Petitioner concedes that the instant action is not

[5] One of the Department of Justice Attorneys conducting the investigation affirmed, under oath, that "[t]he grand jury is engaged solely in the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever."

[6] *See* footnote 12 infra.

[7] Following the district court's denial of relief and its refusal to stay compliance with the subpoenas pending review by us, petitioner sought a stay from a single circuit judge of this court. The stay was denied; however, we agreed to hear the case on an expedited basis.

made appealable by § 1292, but instead contends that the district court's order constitutes a final decision with the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). We disagree.[8]

[2-4] It is settled in this circuit that the appropriate way to challenge alleged "errors or abuses of discretion on the part of district judges in dealing with grand jury investigations" is through a petition for a writ of mandamus. *United States v. United States District Court,* 238 F.2d 713, 719 (4 Cir. 1956), *cert. denied, Valley Bell Dairy Co. v. United States,* 352 U.S. 981, 77 S. Ct. 382, 1 L. Ed. 2d 365 (1957). *Accord, In re April 1977 Grand Jury Subpoenas,* 573 F.2d 936, 940-41 (6 Cir. 1978), *rehearing en banc granted* (June 8, 1978); *Application of Johnson,* 484 F.2d 791, 795 (7 Cir. 1973). The grand jury process, like the discovery process in civil litigation, on occasion gives rise to questions of exceptional importance despite the early stage at which they occur. Even though the decisions of district courts to intervene or to decline to intervene in these pre-trial processes are not routinely appealable, the power of mandamus is available where the question presented is of such exceptional importance or extraordinary nature that justice requires immediate review. *Cf. Schlangenhauf v. Holder,* 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964); *United States Board of Parole v. Merhige,* 487 F.2d 25 (4 Cir. 1973), *cert. denied,* 417 U.S. 918, 94 S. Ct. 2625, 41 L. Ed. 2d 224 (1974). Therefore, while we lack jurisdiction to entertain this appeal, we do not

[8] *Cohen* did not involve an appeal from a district court decision involving grand jury matters. On at least two occasions the Supreme Court has held that refusals to quash grand jury subpoenas are not appealable as final decisions under § 1291. *United States v. Ryan,* 402 U.S. 530, 91 S. Ct. 1580, 29 L. Ed. 2d 85 (1971); *Cobbledick v. United States,* 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 460 (1940). *See also In re Special March 1974 Grand Jury, Etc.,* 541 F.2d 166 (7 Cir. 1976), *cert. denied,* 430 U.S. 929, 97 S. Ct. 1547, 51 L. Ed. 2d 773 (1977). The reasoning in these cases is dispositive of our lack of appellate jurisdiction.

doubt our authority, under the All Writs Act, to direct the district court to take whatever action is necessary and proper to protect petitioner's legitimate interests in an appropriate case.

[5] For us to exercise this power, however, the circumstances must be particularly compelling. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976). Petitioner necessarily carries a heavy burden in convincing us to issue the writ. Not only must we be persuaded that petitioner has a clear and indisputable right which the district court by its action has abridged, but we must also be persuaded that unless we act promptly to rectify the district court's error, petitioner's right will be irretrievably lost. *See Kerr v. United States District Court, supra,* at 403, 96 S. Ct. 2119; *Will v. United States,* 389 U.S. 90, 95-96, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 382-85, 74 S. Ct. 145, 98 L. Ed. 106 (1953); *Roche v. Evaporated Milk Association,* 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). With these considerations in mind, we turn to the merits of petitioner's case.

III.

Petitioner contends that the powers of the grand jury have been purposely abused by the government and that, because of the government's improper motives, petitioner should not be subjected to the grand jury's process and the grand jury's investigation should be terminated. Briefly stated, petitioner alleges that IRS has had a history of using grand jury powers to further administrative investigations that have otherwise become stymied.[9]

[9] Petitioner attempts to substantiate this allegation by citing an IRS practice commonly known as an "open-ended grand jury" proceeding. As the relevant section (now withdrawn) of the Internal Revenue Manual states, it was

Coupled with its allegation of historical abuse, petitioner points out that, in the instant case, IRS was conducting a joint civil and criminal investigation during which petitioner was served with a number of administrative summons with which it refused to comply, and this refusal was subsequently vindicated in an enforcement action in the district court. Shortly after IRS lost its court battle to enforce the summons, the grand jury investigation began, with several agents previously involved in the administrative investigation being deputized for the grand jury probe. The subpoenas then served by the grand jury sought the same materials which the IRS had unsuccessfully attempted to obtain administratively. Petitioner's inference, which it wants the district court to investigate, is that the grand jury is being used as a subterfuge for gaining access to documents IRS needs in its pending civil and criminal investigation of petitioner.[10]

The district court refused to conduct the investigation into the government's motives and purposes which petitioner sought. Instead it relied on an affidavit by a Department of Justice attorney attesting to the government's good faith in utilizing the grand jury. We agree with the district court that no further inquiry is required at this juncture and that petitioner is subjected

established IRS practice, until recently, to recommend a grand jury investigation when an administrative *criminal* investigation had become stymied. The expectation was that the grand jury could develop evidence, unobtainable by administrative procedures, which would allow IRS to make a better informed recommendation to the Justice Department concerning whether or not to prosecute. *See* § 9267.4, Internal Revenue Manual (withdrawn November, 1977). While we express no opinion as to the propriety of this practice, we do not think that it lends support to the allegation that IRS regularly engaged in the use of the grand jury process for *civil* law enforcement purposes. Petitioner's other attempts at buttressing its suspicions of official wrongdoing are equally unconvincing.

[10] The government denies any illicit motivation, explaining the decision to initiate a grand jury investigation by pointing to the imminence of the bar of limitation. *See* n.2, *supra*.

to no risk of substantial injury by allowing the grand jury to run its course.

[6-8] A grand jury is convened to determine "if there is probable cause to believe that a crime has been committed . . ." *Bransburg v. Hayes,* 408 U.S. 665, 686, 92 S. Ct. 2646, 2659, 33 L. Ed. 2d 626 (1972). If the powers of the grand jury, including the power to subpoena documents, are used, not for the purpose of criminal investigation but rather to gather evidence for civil enforcement, there exists an abuse of the grand jury process. *United States v. Proctor & Gamble,* 356 U.S. 677, 683, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958); *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. 1098, 1118 (E.D. Pa. 1976). This is the abuse alleged by petitioner.[11] The precise question for decision is whether a district court is obliged to conduct a full evidentiary hearing at the time such abuse is alleged or whether it is sufficient, during the course of the grand jury's proceedings, to rely on the government's own affirmations of good faith.

[9, 10] We begin with the well-recognized principle that courts should not intervene in the grand jury

[11] A secondary contention made by petitioner both in brief and at argument is that the grand jury process was abused because the government failed to adhere strictly to its internal procedures for initiating grand jury investigations in tax cases. We find this contention to be totally devoid of merit. Petitioner has no entitlement to have any particular internal policy followed with regard to the decision to institute a grand jury investigation. *Cf. Sullivan v. United States,* 348 U.S. 170, 75 S. Ct. 182, 99 L. Ed. 210 (1954). Petitioner's only legitimate concern is that it not be subjected to an investigation conducted for illicit purposes.

This secondary contention is also the basis for petitioner's claim that the present grand jury proceedings are in aid of IRS's pending administrative *criminal* investigation. Apparently its theory is that the present grand jury may not validly indict, even if it has a proper evidentiary base, because the government's internal administrative procedures for investigating criminal cases have not been fully satisfied. We disagree. Thus, we deem the alleged abuse of the grand jury process to be solely that of improper aid to pending *civil* litigation.

process absent compelling reason. *United States v. Dionisio,* 410 U.S. 1, 16-18, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973). Clearly, to hold an evidentiary hearing into prosecutorial motivation with an eye toward quashing otherwise lawfully issued subpoenas and even terminating the entire process would be substantial judicial intervention. Nonetheless, such intervention might well be required if it were the only means of protecting petitioner from the abuse he alleges. There is, however, a less drastic remedy in F.R. Crim. P. 6(e). The district court made clear that it considered Rule 6(e) to be adequate protection of petitioner's interests. We agree.

Rule 6(e), as recently amended,[12] provides generally that materials secured by the grand jury in the course

[12] As amended by Pub. L. 95-78, 91 Stat. 319 (1976), effective October 1, 1977, Rule 6(e) provides as follows:

(e) Secrecy of Proceedings and Disclosure.—

(1) General rule. — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) . . .

of its investigation shall not be disclosed except as authorized in subsection (2). As relevant here, subsection (2) allows disclosure to "an attorney for the government for use in the performance of [his] duty" and to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." In the instant case, the government attorney in charge of the grand jury investigation deemed it necessary to secure the assistance of several special agents with some knowledge of petitioner's business and tax affairs.[13] Subsection (2) also imposes certain obligations with respect to disclosure to these necessary government personnel.

[13] In its brief, petitioner also challenges the participation of some or all of these IRS agents in the grand jury investigation, arguing that such participation violates Canon 9 of the American Bar Association Code of Professional Responsibility and Section 1.2(a) of the Association Standards Relating to the Prosecution Function. In making this argument, petitioner relies heavily on a recent panel decision in the Sixth Circuit, *In re April 1977 Grand Jury Subpoenas,* 573 F.2d 936 (6 Cir. 1978), *rehearing en banc granted* (June 8, 1978), in which the panel vacated the appointment of an IRS lawyer to assist in a grand jury investigation on the ground that the appointment gave the appearance of impropriety. 573 F.2d at 947-48. While we find the dissenting views of Judge Merritt on this point somewhat more persuasive than those of the majority, we need not reach this issue at this time because of petitioner's failure to make his challenge first before the district court.

Their names and a description of the materials disclosed must be provided to the district court. Each is under a duty not to "utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." Each of the special agents involved in the instant case has been advised of his duty not to disclose grand jury material and that a breach of this duty is punishable by contempt.[14]

This is not to say that the Audit Division, which is charged with civil enforcement of federal tax law, has no legitimate interest in the materials secured by the grand jury. "The Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins." *United States v. LaSalle National Bank*, ——— U.S. ———, ———, 98 S. Ct. 2357, 2365, 57 L. Ed. 2d 221 (1978). Congress recognized this in amending Rule 6(e) and, accordingly, authorized judicially supervised disclosure of grand jury materials to government agency personnel for civil law enforcement purposes. *See* S. Rep. No. 95—354, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Admin. News, pp. 527, 531-32.

Very recently one of the district courts in this circuit had occasion to supervise such a disclosure and in so

[14] At oral argument, we were advised that the special agents assigned to the instant investigation have been filing reports of the proceedings with their superior, the Chief of the Service's Intelligence Division. We assume that the district court has also been advised of this fact. So long as the district court is aware of this disclosure, we do not view it as a breach of Rule 6(e)(2)(B). It is the obligation of the Chief of the Intelligence Division to supervise the special agents assigned to that Division. That these agents have been assigned temporarily to assist in a grand jury investigation makes them no less responsible to their supervisor. Effective supervision is impossible if the supervisor is unaware of his agent's activities. Thus, we think the disclosure necessary to assist the Chief in the performance of his duties. As one to whom disclosure may be made, he, too, is under the non-disclosure obligation of Rule 6(e)(2)(B) and the possible penalty for contempt.

doing developed certain criteria which the government must meet in order to secure a disclosure order under Rule 6(e)(2)(C)(i), where the purpose of such disclosure is to aid civil tax enforcement. *First*, the government must provide a general description of the materials sought in order to allow the court intelligently to determine if such materials are rationally related to an existing or contemplated civil proceeding. *Second*, and of particular importance to the instant case, the government must satisfy the court that "the grand jury proceeding has not been used as a subterfuge for obtaining records for a civil investigation or proceeding." *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743, 751 (D. Md. 1978).

[11, 12] We fully agree that the government should be required to demonstrate its *bona fides* prior to obtaining a Rule 6(e)(2)(C) order. This showing is particularly important where the grand jury fails to return an indictment. In such case, the likelihood of improper use of the grand jury process is substantially greater, *see, e.g., United States v. Pennsalt Chemicals Corp.*, 260 F. Supp. 171 (E.D. Pa. 1966), and an evidentiary hearing of the type now sought by petitioner might be necessary before disclosure is ordered.[15]

[13] In sum, we are of the opinion that petitioner's legitimate interests are fully protected by Rule 6(e). Disclosure to the IRS for civil enforcement purposes requires a court order predicated on a demonstration of good faith. Unauthorized disclosure is deterred by the threat of contempt.[16]

[15] The district court in *In re December 1974 Term Grand Jury Investigation, supra*, concluded that Congress intended that the government's application for a disclosure order be *ex parte* in the interests of grand jury secrecy. However, it is our view that the district court proceeding *ex parte* is not precluded from holding as extensive a hearing as is required to satisfy it that the government's use of the grand jury process has been proper.

[16] While we do not decide the issue, it may well be argued in an appropriate case that fairness would require exclusion of any evidence in a civil proceeding which had been improperly obtained from the grand jury. *See* S. Rep. No. 95—354, *supra*, at n.12.

We emphasize that the extent of petitioner's legitimate interest is that the grand jury process not be used for the primary purpose of obtaining materials relevant only to civil liability. We do not think that petitioner has alleged a case entitling it to the issuance of a writ of mandamus; and, because of the safeguards contained in Rule 6(e) and the government's representations as to motivation, we conclude that an evidentiary hearing at this juncture is neither warranted nor required in order to protect this interest. A hearing of the sort sought by petitioner at this stage in the proceedings would result in both an unwarranted breach of grand jury secrecy and an unnecessary delay in its proceedings. Particularly with a limitations period soon to run, we agree with the district court that the proper course is to let the grand jury process continue unimpeded. If there does exist evidence of criminal liability, it is in society's interest that this be made available to the grand jury before limitations have run. Any abuse of the grand jury process can be dealt with effectively at another time and in another manner.

No. 78—1335 — PETITION DISMISSED;
No. 78—1336 — APPEAL DISMISSED.

APPENDIX C

United States District Court
For the District of Maryland

No. H78-725, Civil

Fairchild Industries, Inc.

v.

United States of America

May 30, 1978
Baltimore, Maryland

Before the HONORABLE ALEXANDER HARVEY, II, U. S. District Judge, in camera, at 9:15 a.m.

PROCEEDINGS
ORAL OPINION

(The Court) Presently pending before the Court in this case are several motions filed by Fairchild Industries, Inc. All of these motions pertain to grand jury proceedings which have been initiated by the United States Attorney for the District of Maryland. The grand jury in question is currently investigating possible criminal violations by Fairchild, including certain tax offenses.

The pending motions include (1) a motion to quash grand jury subpoenas, to terminate the grand jury proceedings and for protective orders; (2) a motion for an order directing the recording of grand jury proceedings and (3) a motion for production of all exparte

orders and documents relating to the initiation of the grand jury proceedings.

Fairchild has also filed a motion seeking a stay of compliance with all grand jury subpoenas pending resolution of the motion to quash. This latter motion was granted by the Court, with the consent of the government, on May 4, 1978. Fairchild has also requested an evidentiary hearing on its motion to quash.

Briefs in support of and in opposition to the pending motions have been filed by Fairchild and the United States Attorney. Fairchild has also filed reply briefs.

After a review of these briefs and the pertinent authorities and after hearing oral argument last Friday afternoon, May 26th, in chambers, this Court is satisfied that all the pending motions should be denied.

I.

The Motion to Quash Subpoenas, Terminate the Grand Jury and For a Protective Order:

This current criminal investigation by the January 1978 Special Grand Jury of this court has arisen following years of civil tax audits of Fairchild and following civil litigation between Fairchild and the Internal Revenue Service. Indeed, there is currently pending before the Tax Court a civil action in which the government is seeking to recover from Fairchild some $39 million in back taxes, penalties and interest.

The essential question posed here by Fairchild's first motion is whether the Executive branch should have unfettered discretion to determine when a federal grand jury should be utilized to investigate potential criminal violations, tax or otherwise, after the Internal Revenue Service has begun administrative proceedings involving possibly related matters in a civil tax investigation of the target of the criminal investigation. This court concludes that the Executive branch of the federal government does indeed have discretion to proceed under circumstances such as those present here.

Fairchild argues (1) that the federal grand jury here is probing similar issues as are involved in the pending Tax Court suit and that the government should not be

permitted to circumvent the limited discovery in Tax Court cases by utilizing a grand jury for civil discovery; (2) that this grand jury is being assisted by IRS personnel who participated in the administrative proceedings and therefore might violate the independence and secrecy of the grand jury; and (3) that utilization of the Grand Jury circumvents administrative protections available in civil tax investigations.

These propositions advanced by Fairchild are indeed novel ones. Fairchild urges this Court to hold that the Executive Branch of the Federal government must demonstrate, in an evidentiary hearing prior to any grand jury investigation, the necessity of the proposed investigation by the grand jury where prior civil investigations have been conducted by the IRS.

In support of its position, Fairchild notes: *inter alia,* that the IRS has withdrawn former Section 9267.4 of the Internal Revenue Manual, which formerly specified procedures for referral of tax investigations to the Department of Justice for criminal investigation.

At the very outset, this Court would note that it is well established that a grand jury cannot be convened for the improper purpose of gathering evidence for civil proceedings. *See, e.g., Robert Hawthorne, Inc. v. Director of Internal Revenue Service,* 406 F. Supp. 1098, 1118 (E.D. Pa 1975) and cases cited therein.

On the other hand, a properly convened grand jury can disclose evidence for use in civil proceedings to certain attorneys for the government and others upon an appropriate order of court. *See* Rule 6(e)(2); F.R. Crim. P. as amended, effective October 1, 1977; *In Re December 1974 Term Grand Jury Investigation,* 46 U.S. Law 2482 (D. Md. February 23, 1976) (Miller, J.).

The Executive branch has broad discretion to initiate grand jury investigations. This discretion has constitutional roots in Article II, Sec. 3, which entrusts the Executive with the duty "that the Laws be faithfully executed." Moreover, the Supreme Court has repeatedly reaffirmed, in recent years, the broad investigatory

powers of the grand jury, *e.g., United States v. Calandra,* 414 U.S. 338 (1974), and has cautioned against "any holding that would saddle a grand jury with minitrials and preliminary showings," *United States v. Dionisio,* 410 U.S. 1, 18 (1973).

With good reason, courts have stoutly resisted attempts to convert grand jury proceedings into a pre-indictment trial.

As Judge Augustus Hand said some fifty years ago in *United States v. Morse,* 292 F. 273, 278-79 (S.D.N.Y. 1922):

> "It must be remembered that a proceeding before a grand jury is an inquest and not a trial. If defendants are treated as having any right to be heard, the whole affair is likely to cease to be an *ex parte* proceeding resulting in a charge which can be fully met at the trial, but to become a litigation in which each side has the right to offer evidence, and an indictment can only be found if the evidence on the whole case preponderates against the defendants. Such it is believed was never the function of the grand inquest."

That statement remains the basic law today. Proceedings before the grand jury remain essentially unimpeded by the evidentiary and procedural restrictions of a criminal trial. As noted, the Supreme Court has repeatedly recognized that the grand jury investigative powers must be as broad as possible if its public responsibility is to be adequately discharged.

Thus, in *Calandra, supra,* the Supreme Court recognized that a defendant cannot complain that an indictment is defective even if the grand jury heard evidence gained as a result of an illegal search or seizure. Mr. Justice Powell said the following (414 U.S. at 349-350):

> "Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be 'protracted interruption of

> grand jury proceedings,' * * * effectively transforming them into preliminary trials on the merits. In some cases, the delay might be fatal to the enforcement of the criminal law."

Other cases have held that administrative proceedings before the Internal Revenue Service are not the exclusive method for a government investigation of income tax matters and that civil statutes and regulations do not limit the powers of a grand jury. *In Re Radish,* 377 F. Supp. 951, 952 (N.D. Ill. 1974); *In Re Goldman,* 331 F. Supp. 509, 510 (W.D. Pa. 1971); *see also Robert Hawthorne, Inc. v. Director of Internal Revenue Service,* 406 F. Supp. 1098, 1105 (E.D. Pa. 1975).

Fairchild relies on several recent cases in support of its decision here. First of all, *United States v. Phillips Petroleum Co.,* 435 F. Supp. 610 (N.D. Okl. 1977), is not in point. *Phillips* did not involve pre-investigation motions such as these, but rather, a post-indictment motion to dismiss for flagrant abuse of the grand jury process. Involved in that case were questions pertaining to the "continuation" of the proceedings without the presence of the grand jury and also the suppression of exculpatory evidence. The Court noted but did not decide whether the use of a so-called "open ended grand jury" in tax investigations was an abuse of the grand jury process. The term "open ended grand jury" being used as a term of art, referring to former Section 9267.4 of the *Internal Revenue Manual.* That section, which has now been withdrawn from the Manual did no more than specify internal procedures for the referral of tax investigations by the Internal Revenue Service to the Department of Justice for criminal investigation.

In Re General Motors Corp., Misc. No. 77-144 (E.D. Mich. June 28, 1977) also relied upon by Fairchild, was an unsuccessful attempt by General Motors to quash subpoenas growing out of a tax investigation by a grand jury. On appeal, the Sixth Circuit reversed and terminated the grand jury proceedings on the grounds that the IRS attorney who had recommended criminal referral and was then assisting in the grand jury

investigation, violated the ABA Code of Professional Responsibility standard against "the appearance of impropriety." *See General Motors v. United States,* 46 USLW 2545 (6th Cir. April 5, 1978) (Merritt, J. dissenting). However, neither the district court nor the Sixth Circuit panel held that the grand jury proceedings were improper because they came after civil administrative proceedings.

In opposing the pending motions here, the government has submitted the affidavit of Paul J. Schaeffer, an attorney with the Criminal Section of the Tax Division of the Department of Justice. That affidavit flatly states that "the grand jury is engaged solely in the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever." This Court will accept that affidavit as sufficient for the purpose of showing that this grand jury is properly considering criminal, not civil matters.

Fairchild asserts that to permit the Executive branch of the government to proceed under an affidavit of this sort would be to allow the Executive branch, in its sole discretion, to initiate a grand jury investigation of this sort. But clearly the Executive branch has always possessed unfettered discretion of this sort. Not only is this discretion constitutionally permissible but it is in fact mandated by Article II, Sec. 3. *See United States v. Cox,* 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 995 (1965). Moreover, Fairchild's novel arguments, unsupported by any authority, that the government must justify, in an evidentiary hearing the basis for each proposed grand jury investigation, are clearly inconsistent with the Supreme Court's admonition against "any holding that would saddle a grand jury with minitrials and preliminary showings." *United States v. Dionisio, supra.*

Accordingly, Fairchild's motion to quash the subpoenas and to terminate the grand jury because of

Fairchild's unsupported claim of potential grand jury abuse, is without merit and will be denied summarily, without an evidentiary hearing.

Alternatively, Fairchild has asked this Court to enter a protective order limiting access to grand jury evidence.

Fairchild contends that Rule 6(e), F.R. Crim. P., as recently amended, and Judge Miller's opinion in this court, interpreting that rule, *In Re December 1974 Term Grand Jury Investigation.* 46 L.W. 2482 (D. Md. Feb. 23, 1978), are inadequate. Fairchild urges this Court to adopt the procedures suggested under old Rule 6(e) by the Ninth Circuit in the now withdrawn opinion of *J. R. Simplot Co. v. United States District Court,* 77-2 U.S.T.C. 9511 (9th Cir. 1977).

These procedures include (1) a government showing of necessity for security permission for the assistance of all persons connected with the grand jury investigation and (2) that subsequent disclosure of grand jury material for civil use be preceded by an adversary hearing at which the government must show a compelling need for the materials sought. However, the *Simplot* case (now withdrawn in any event) preceded the amendments to Rule 6(e). More importantly, the rationale of the *Simplot* case was expressly rejected by the Congress. *See* Senate Report No. 95-354, 95th Congress, 1st Session, *Reprinted in* 1977 U.S. Code, Congressional and Administrative News 527.

This Court is satisfied that Judge Miller's opinion correctly interprets the new Rule 6(e).

This Court would agree completely with the reasoning and conclusions of that opinion, which will be followed in this case. In any event, this Court would note that it would at this time be premature to enter any order about subsequent civil access to grand jury material, where, as here, the grand jury investigation has barely begun and no particularized request for access to grand jury materials has as yet been made by the government.

This Court concludes that the government need not make a showing of necessity for each person designated to assist the attorneys for the government in grand jury proceedings.

Amended Rule 6(e)(2)(a)(ii), F.R. Crim. P., provides that disclosure may be made to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Thus, the Rule leaves the determination of necessity to the discretion of the prosecuting attorneys. *See Robert Hawthorne, Inc. v. Director of Internal Revenue Service, supra,* at 1120-1128; and the expressed legislative intention when the new rule was adopted. S. Rep. No. 95-354, 95th Cong. 1st Sess., *Reprinted in* 1977 U.S. Code Congressional & Administrative News 527.

The affidavit of Special Attorney Paul J. Schaeffer establishes that all persons who will have access to grand jury materials have been or will be disclosed to the court as required by Rule 6(e) and all such persons have been or will be advised in writing that grand jury investigations are criminal in nature, are secret, that no disclosure of materials gathered through the grand jury may be used for any civil proceeding unless ordered by the Court and that unauthorized disclosure of grand jury materials is punishable by contempt proceedings.

The affidavit further states that all documents and transcripts of testimony obtained through grand jury process will be maintained under the aegis and control of the United States Attorney for the District of Maryland.

This Court is satisfied that these precautions are sufficient and therefore the protective order requested by Fairchild will likewise be denied.

* * * * * *

III.

Motion to Direct Production to Fairchild of Ex Parte Orders Heretofore Issued and Documents Relating to the Initiation of the Pending Grand Jury Proceedings.

Fairchild's request for disclosure of *ex parte* orders is no more than a premature attempt to obtain preindictment (indeed pre-investigation) criminal discovery of matters which are not even within the scope of Rule 16 of the Federal Rules of Criminal Procedure. In any event the government has represented that there are no such orders. Accordingly, this part of Fairchild's motion will be denied.

Fairchild also seeks pre-indictment discovery of prosecutorial memoranda. Such discovery is clearly not permissible at this stage of the proceedings. This Court would agree with the reasoning of Judge Churchill, the district judge in the *General Motors* case, that:

> "Whatever the motivations, there is no evidence that the Justice Department in this case plans or intends to use the grand jury subpoenas to gather evidence not relating to its criminal investigation."

In Re April 1977 Grand Jury Subpoenas, Misc. No. 77-144 (E.D. Mich. June 28, 1977) (slip opinion at 11); *reversed in part on other grounds, General Motors v. United States supra.* The affidavit of Special Attorney Schaeffer establishes that the grand jury is engaged solely in the investigation of criminal matters. The target of a grand jury investigation, like Fairchild, cannot be permitted to engage in a fishing expedition of government files in an attempt to find something to support its theory of grand jury abuse, particularly where, as here, the theory has been found by the Court to be lacking in merit. Moreover, the legal conclusions of the attorneys of the Internal Revenue Service and the Tax Division of the Department of Justice are privileged as work product under *Hickman v. Taylor,* 329 U.S. 495 (1947), at the very least at this stage of the proceedings. *See In Re Grand Jury Investigation General Motors Corp.,* 32 F.R.D. 175, 179-180 (S.D.N.Y.),

appeal dismissed, 318 F.2d 553 (2d Cir.), *pet. for cert. dismissed,* 375 U.S. 802 (1963).

Accordingly, this motion of Fairchild's will likewise be denied.

Now, gentlemen, I will enter appropriate orders and that will include lifting the stay as to compliance; and is there any problem about compliance with the subpoenas and so forth?

What is your next move, Mr. Garbis?

MR. GARBIS: Your Honor, my next move is to probably file a document pointing out something in the opinion I'd like the Court to consider; but putting that aside, putting aside whatever you might do, attempt to get appellate review — we are going to work it out with Mr. Hyland.

THE COURT: Well, that brings up the question of appellate review if that is your intention because, as noted, we have problems of delay and we have a limitations question. Because if you want to move for a stay pending appeal, you ought to move now and I will deny it because I think it should go right up immediately. And the only stay that I would permit is a stay for a few days to permit this to be written up. And if you are going to appeal, I think that is where it should go. If there are errors here, you can take it to the appellate court because we just cannot have further delay, which quite obviously benefits your clients.

So what is your intention?

MR. GARBIS: Well, my intention, Your Honor, first of all, my intention is not to maneuver for delays. Whether or not the Court granted a stay.

THE COURT: You want to move for a stay now?

MR. GARBIS: Yes, sir.

THE COURT: All right. Well, I will deny the stay and I will grant it no longer than it will take to present this. You would have to then ask the Fourth Circuit to stay. That is what you would have to do, arrange an

appointment with Judge Winter. I suggest that you do that immediately for some time this week; and we would hope to have this for you in a couple of days then, arrange a conference with Judge Winter and ask him for a stay.

MR. GARBIS: Yes, Your Honor.

THE COURT: The reasons for denying the stay are the delay it has taken so far and the reasons that have been stated in my Oral Opinion here.

I think you would be entitled to let the Fourth Circuit review my ruling and see if they want to grant a further stay because, as I understand, the government wants to proceed immediately with these proceedings.

MR. HYLAND: That's correct, Your Honor.

MR. GARBIS: Your Honor, I would also ask the Court to consider certifying the question, the basic question on the motion to quash and I certainly don't want to impose on Your Honor to reargue this case. I would just point out, as I would in a document, had we followed a more leisurely path, that Your Honor's decision is based on the premise that the instant grand jury follows a civil tax investigation, and that is not the fact. I think the documents in the record clearly establish that the instant grand jury follows the criminal administrative investigation. That is the testimony before Judge Miller as to Manual. This was a joint investigation.

THE COURT: All right, as you say, we are not going to reargue the motion. That will be denied. I think the record is very clear as to what appears there. There was no prior grand jury proceedings whether you want to call it civil or criminal, but you can argue whatever you want to the Fourth Circuit. We are not going to have reargument here.

MR. GARBIS: Of course not.

THE COURT: We are not going to have a motion or rehearing here and we are not even going to have a stay here. So I hope that should be very very clear because we just cannot brook any further delay. And obviously,

any time that you file papers, you get delay and you put off the time for the Statute of Limitations to a time when the government can't act.

So we'll get these papers to you and you can arrange the appointment with Judge Winter immediately, and the only stay that I will grant, which would be an oral one, will be until the Fourth Circuit has a chance to act on whether they would stay the further proceedings because this Court will not stay further proceedings. You can go ahead and file your appeal and appeal. But I think grand jury proceedings should go right ahead.

MR. GARBIS: Your Honor, independent of the stay, have you denied my request to certify the question?

THE COURT: Yes, that will be denied also. You can take that up on appeal, whatever you want.

MR. GARBIS: Okay, Your Honor, I think that you will find that we have acted in good faith with Mr. Hyland to not delay the—

THE COURT: Well, I haven't gotten into the question of good faith but quite obviously, all this maneuvering has granted you a tremendous amount of time which you otherwise wouldn't have; and which I am satisfied you shouldn't have.

MR. HYLAND: Your Honor, could I just clarify one thing with respect to the government's position on recording grand jury testimony:

In this particular investigation of Fairchild and in other investigations similar to this, it is the U.S Attorney's policy to record all witness testimony.

THE COURT: Well, I said that.

MR. HYLAND: Yes, Your Honor.

THE COURT: I don't want to reargue the case with you either. I am due in court at 10 o'clock, with a jury.

MR. HYLAND: No, I just meant to clarify that it was not the U.S. Attorney's position to record all testimony in all cases before all grand juries. I just wanted to clarify that one point.

THE COURT: You said you would do it in this case. All right.

MR. HYLAND: Yes, Your Honor.

THE COURT: All right, thank you, Gentlemen.

MR. HYLAND: Thank you very much, Your Honor.

MR. GARBIS: Thank Your Honor.

(Thereupon, at 9:50 a.m., the aforecaptioned proceedings were concluded.)

APPENDIX D

In the United States District Court
For the District Of Maryland

IN RE: JANUARY 1978 GRAND JURY

FAIRCHILD INDUSTRIES, INC.,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

Civil No. H-78-725

ORDER

An *in camera* hearing having been held in Chambers on May 26, 1978, on various motions filed herein by Fairchild Industries, Inc. (hereinafter "Fairchild"); and the Court having rendered an oral opinion on May 30, 1978, it is this 31st day of May, 1978, by the United States District Court for the District of Maryland,

ORDERED:

1. That this Court's Order of May 4, 1978, staying compliance with certain subpoenas served on Fairchild in connection with this pending investigation be and the same is hereby rescinded;

2. That the motion of Fairchild to quash grand jury subpoenas, to terminate grand jury proceedings and for Protective Orders be and the same is hereby denied;

3. That the motion of Fairchild for an Order directing the recording of grand jury proceedings be and the same is hereby denied;

4. That the motion of Fairchild for an Order directing production of *ex parte* Orders heretofore issued and production of other documents relating to these grand jury proceedings be and the same is hereby denied;

5. That Fairchild's oral motion for a stay pending appeal be and the same is hereby denied, provided that this Order shall not become fully effective until Fairchild has applied to a Judge of the Fourth Circuit for a stay pending appeal;

6. That Fairchild's oral motion for an Order permitting an appeal under 28 U.S.C. § 1292(b) be and the same is hereby denied; and

7. That the Clerk is directed to close this file.

ALEXANDER HARVEY II
United States District Judge.

Supreme Court, U. S.
FILED
MAR 2 1979
R., CLERK

No. 78-1055

In the Supreme Court of the United States

OCTOBER TERM, 1978

FAIRCHILD INDUSTRIES, INC., PETITIONER

v.

HONORABLE ALEXANDER HARVEY, II,
UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Page

Cases—Continued:

Statutes and rules:

Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33a-44a) is reported at 581 F. 2d 1103. The oral opinion of the district court (Pet. App. 45a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1978. On October 19, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 31, 1978, "without prejudice to the Court's consideration of whether this application has been filed on time." The petition for a writ of certiorari was filed on December 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in denying a writ of mandamus to direct the district court to hold an evidentiary hearing into allegations that the government was misusing an ongoing grand jury proceeding.

2. Whether the assistance provided to the grand jury by Internal Revenue Service personnel conflicts with *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

3. Whether the involvement in the grand jury proceeding of Internal Revenue Service personnel who also participated in a civil tax audit of petitioner constitutes a conflict of interest that invalidates the grand jury's investigation.

STATEMENT

Petitioner is the subject of a pending federal grand jury investigation into possible criminal violations of the Internal Revenue Code.[1] Following several years of civil audit and a criminal tax investigation of petitioner, the Internal Revenue Service referred the case to the Department of Justice for presentation to a grand jury (Pet. App. 34a). Thereafter, a grand jury was empanelled in the United States District Court for the District of Maryland, and grand jury subpoenas were issued to

[1]On September 8, 1978, following the court of appeals' denial of mandamus and dismissal of petitioner's appeal (Pet. App. 33a-34a), the grand jury indicted petitioner and its chairman, Edward G. Uhl, on two counts of willfully filing false corporate income tax returns for the years 1971 and 1972, in violation of 26 U.S.C. 7206. The grand jury investigation, which had initially been opened to consider the taxable years 1971-1975, was suspended pending the conclusion of the trial. On February 7, 1979, the district court (Judge James R. Miller, Jr.) entered a judgment of acquittal on the false filing charges covering 1971 and 1972. The government is now considering whether to present evidence to the grand jury for the later years.

petitioner seeking the production of certain documents believed to be in its possession (*id.* at 34a-35a).

Petitioner moved to quash the subpoenas and to terminate the grand jury investigation on the ground that the Internal Revenue Service was abusing the grand jury process by attempting to secure evidence otherwise unobtainable through its administrative process. Petitioner sought an evidentiary hearing to determine whether the government had violated the grand jury secrecy provisions of Fed. R. Crim. P. 6(e).[2]

In response, the government attorney handling the grand jury proceeding submitted an affidavit stating that "the grand jury is engaged solely in the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever" (Pet. App. 35a n.5, 50a). The affidavit further stated that all IRS agents assisting the grand jury had been informed in writing that grand jury materials could not be used for civil purposes in the absence of a court order and that improper use of grand jury evidence was punishable by contempt (*id.* at 52a). Finally, the prosecutor stated under oath that the government had complied with Fed. R. Crim. P. 6(e)(2)(B) by notifying the Chief Judge of the District of Maryland of the identity of each IRS employee who had been given access to grand jury materials and that the government would continue to advise the court of the identity of any additional employees exposed to such evidence (*ibid.*).

Relying on the prosecutor's affidavit, the district court (Judge Alexander Harvey, II) held that the procedure established by the government met the requirements of

[2]The court of appeals noted that civil tax litigation concerning petitioner was pending in the Tax Court and that petitioner was the subject of a continuing civil audit (Pet. App. 34a n.2).

Rule 6(e) and that petitioner's "unsupported claim of potential grand jury abuse" was without merit (Pet. App. 51a). It accordingly denied petitioner's motions to quash the subpoenas and to terminate the grand jury (*ibid.*). The court also denied petitioner's request for discovery and an evidentiary hearing. Judge Harvey concluded that "[t]he target of a grand jury investigation, like [petitioner], cannot be permitted to engage in a fishing expedition of government files in an attempt to find something to support its theory of grand jury abuse, particularly where, as here, the theory has been found by the Court to be lacking in merit" (*id.* at 53a).

Petitioner sought review in the court of appeals, asserting that the district court's order was final and appealable under 28 U.S.C. 1291. In the alternative, petitioner sought a writ of mandamus to direct the district court to grant the requested relief. The court of appeals dismissed petitioner's appeal under Section 1291 on the ground the district court's order was interlocutory (Pet. App. 36a n.8). It also concluded that petitioner was not entitled to the extraordinary remedy of mandamus, holding that the government's sworn representations, combined with the safeguards contained in Rule 6(e), made it unnecessary for the district court to conduct an evidentiary hearing on petitioner's allegations of grand jury abuse at this stage of the case. "[T]he proper course," said the court, "is to let the grand jury process continue unimpeded. * * * Any abuse of the grand jury process can be dealt with effectively at another time and in another manner" (*id.* at 44a).

ARGUMENT

1. Petitioner contends (Pet. 11-34) that the court of appeals erred in refusing to issue a writ of mandamus directing the district court to conduct an evidentiary hearing on the question whether the government was misusing the grand jury to gather evidence of civil tax

liability.[3] But "issuance of the writ [of mandamus] is in large part a matter of discretion with the court to which the petition is addressed" (*Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976)), and the power to issue the writ is "sparingly exercised" (*Parr* v. *United States*, 351 U.S. 513, 520 (1956)). The court of appeals correctly concluded that there was no extraordinary reason to halt or interfere with the progress of an ongoing grand jury investigation (see *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)) to permit an otherwise prohibited interlocutory appeal (see *In re Special March 1974 Grand Jury*, 541 F. 2d 166, 171-172 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977)), and it properly declined to issue the writ. Accord, *United States* v. *Grand Jury*, 425 F. 2d 327, 329-330 (5th Cir. 1970); *Lampman* v. *United States District Court*, 418 F. 2d 215, 217 (9th Cir. 1969), cert. denied, 397 U.S. 919 (1970). See also *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978).

In support of its claim that the government was using the grand jury for the improper purpose of gathering evidence for civil tax purposes, petitioner (Pet. 27-30) points to: (1) the fact that the grand jury investigation began shortly after the Internal Revenue Service experienced difficulty in obtaining records in a civil audit of petitioner's tax liability and that a number of the agents assisting the government attorneys conducting the grand jury investigation had participated in the civil audit; (2) the possibility that the government was using the grand jury to obtain greater discovery than it was entitled to in pending litigation in the Tax Court; and (3) existing (since withdrawn) and withdrawn internal procedures of the Internal Revenue Service dealing with grand jury investigations.[4]

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[3]Petitioner has abandoned its claim that the district court's order was final and appealable under 28 U.S.C. 1291 (see Pet. 10 n.14).

[4]These procedures provided, *inter alia*, that grand juries would be utilized for the purpose of obtaining the testimony of witnesses who refused to testify during the course of an administrative investigation;

These allegations amount to nothing more than the abstract possibility of abuse of the grand jury. Petitioner cites no concrete evidence to suggest any abuse in this particular case. In these circumstances, the district court was justified in concluding (Pet. App. 37a-38a) that petitioner had failed to produce sufficient proof of grand jury abuse to warrant the delay, disruption and possible breach of grand jury secrecy that would necessarily accompany an evidentiary hearing during the investigative stage of the proceeding.[5]

Moreover, while the government is not required to make a preliminary showing of proper purpose for a grand jury investigation (*United States* v. *Dionisio*, 410 U.S. 1, 17-18 (1973)), here the prosecutor submitted a sworn statement that "the grand jury is engaged solely in

that IRS agents would debrief witnesses following grand jury appearances in an attempt to obtain the same information the witnesses had furnished the grand jury; that if any agent assisting a government attorney in connection with a grand jury investigation prepared a report for that attorney, the report should be submitted to the agent's superior; and that, if an investigation became stymied by a series of reluctant witnesses and a grand jury proceeding was commenced on the request of the IRS, the United States Attorney or the Strike Force Attorney would be advised that jurisdiction of the tax aspects of the case remained with the IRS and the Tax Division of the Department of Justice and that recommendations for prosecution of tax violations would be processed in the regular manner.

[5]Petitioner also relies (Pet. 21-22, 28) on existing IRS internal guidelines in regard to grand jury investigations. But these provisions state that "[s]ervice personnel to whom disclosure is made * * * shall not disclose matters occurring before the grand jury to any and all others (including other Service personnel) except as deemed necessary by the attorney for the Government." Internal Revenue Manual Supplement 9G-85, §2.03 (June 30, 1978). These same rules warn IRS personnel that improper disclosures are punishable by contempt (*ibid.*). Despite petitioner's lengthly criticism of these rules (Pet. 11-27), which were not in effect at the time the district court considered the matter, they do not show any intention on the part of the Internal Revenue Service unlawfully to acquire grand jury evidence for civil purposes.

the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever" (Pet. App. 35a, 50a). Compare *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). As the district court recognized (Pet. App. 50a), to require the government to justify the basis for the grand jury investigation in an evidentiary hearing "would saddle a grand jury with mini-trials and preliminary showings * * * [and] assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws" (*United States* v. *Dionisio*, supra, 410 U.S. at 17. See also *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974); *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956)).

Finally, and perhaps most important in determining the appropriateness of mandamus relief, the court of appeals correctly pointed out (Pet. App. 40a-43a) that petitioner's claim would not be irretrievably lost unless an appellate court acted promptly to rectify the district court's alleged error. As the court observed (*id.* at 40a), petitioner has available "other adequate means to attain the relief * * * [it] desires." *Kerr* v. *United States, supra*, 426 U.S. at 403. Specifically, Rule 6(e) provides that grand jury materials shall not be disclosed except as specifically authorized, and Rule 6(e)(1) states that a knowing violation of the rule may be punished as a contempt of court. Rule 6(e)(2) allows disclosure to "an attorney for the government for use in the performance of * * * [his] duty" and to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." It also provides that these government personnel may not "utilize * * * grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." And although the

Internal Revenue Service may seek disclosure of grand jury evidence for civil use, any such disclosure is subject to judicial supervision under Rule 6(e)(2)(C)(i).

As the court of appeals properly recognized, these provisions are sufficient to protect petitioner against the possibility that grand jury evidence will be improperly used for civil tax purposes. Any "[c]ivil misuse [of grand jury evidence] can be raised in subsequent civil proceedings." S. Rep. No. 95-354, 95th Cong., 1st Sess. 7 n.12 (1977). See *In re April 1977, Grand Jury Subpoenas*, 584 F. 2d 1366, 1370 (6th Cir. 1978), cert. denied *sub nom. General Motors Corp.* v. *United States*, No. 78-739 (Feb. 26, 1979); *In re Special March 1974 Grand Jury, supra*, 541 F. 2d at 170, 172; *Witte* v. *United States*, 544 F. 2d 1026, 1029 (9th Cir. 1976); *Coson* v. *United States*, 533 F. 2d 1119, 1120 (9th Cir. 1976); *In re April 1956 Grand Jury*, 239 F. 2d 263, 272 (7th Cir. 1956). Given these protections against misuse of the grand jury and the strong policy arguments against disrupting ongoing grand jury proceedings, the court of appeals correctly denied the extraordinary remedy of mandamus in this case.

2. Contrary to petitioner's further argument (Pet. 39-42), the decision below does not conflict with *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). There, the Court held that an internal revenue summons is enforceable prior to the reference of the case to the Department of Justice for criminal prosecution unless the Internal Revenue Service has institutionally abandoned pursuit of the taxpayer's civil tax liability. Petitioner argues that *LaSalle National Bank* prohibited the government attorneys conducting the grand jury investigation from obtaining the assistance of IRS personnel who were familiar with petitioner's business and tax affairs because such assistance would permit the IRS to control the decision whether to prosecute.

But the conduct of the government's criminal litigation, including the decision to ask the grand jury to return an indictment, resides exclusively in the Department of Justice. See 28 U.S.C. 515. See also Fed. R. Crim. P. 7(c). The fact that some IRS supervisory personnel, other than the agents directly assisting the attorney handling the investigation, gain knowledge of evidence introduced before the grand jury hardly establishes that the Service is controlling the decision to prosecute.[6] Moreover, as the court of appeals noted (Pet. App. 42a n.14), some participation by IRS supervisory personnel, who have the obligation to supervise the agents under their control, is not improper so long as the supervisors are aware of the prohibition upon the use of grand jury materials for civil purposes in the absence of a court order and the district court is advised of their participation pursuant to Rule 6(e)(2)(B). As the court below correctly observed, as in the case of agents assisting the attorney conducting the grand jury investigation, the sanction of contempt is available to punish improper disclosures of grand jury matters by IRS supervisory personnel. See, *e.g., In re Special March 1974 Grand Jury, supra*, 541 F. 2d at 170; *United States* v. *Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1249 (5th Cir.), cert. denied, 414 U.S. 832 (1973); *United States* v. *Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966).

3. Finally, there is no merit to petitioner's challenge (Pet. 42-45) to the involvement in the grand jury investigation of IRS personnel who also participated in the civil tax audit of petitioner. The persons in question are federal attorneys whose sole client is the United States. Their assistance therefore does not present a

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[6]Petitioner concedes (Pet. 37) that "grand jury assistance by IRS personnel, in itself, is [not] improper under LaSalle."

conflict of interest. See *In re Perlin*, No. 78-2139 (7th Cir. Oct. 4, 1978), slip op. 9-11; *United States* v. *Dondich*, 460 F. Supp. 849, 857 (N.D. Cal. 1978).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

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[7]The court of appeals correctly refused to consider this contention because petitioner failed to raise it in the district court (see Pet. App. 41a n.13). We have discussed the issue more fully in our brief in opposition in *General Motors Corp.* v. *United States*, cert. denied, No. 78-739 (Feb. 26, 1979), a copy of which we are providing to petitioner's counsel.

DOJ-1980-03

Supreme Court, U. S.
FILED
MAR 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1055

FAIRCHILD INDUSTRIES, INC.,

Petitioner,

v.

HONORABLE ALEXANDER HARVEY, II,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1055

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JURISDICTION

The judgment of the court of appeals was entered on August 3, 1978. On October 19, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 31, 1978, "without prejudice to the Court's consideration of whether this application has been filed on time." The petition for a writ of certiorari was filed on December 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented are set forth in the petition for writ of certiorari filed in this matter on December 29, 1978 (Pet. 2-3).

STATEMENT OF THE CASE

Petitioner's statement of the case is set forth in the petition for writ of certiorari filed in this matter on December 29, 1978 (Pet. 3-10). As noted therein, (Pet. 10) on September 8, 1978, the grand jury indicted Petitioner and its chairman, Edward G. Uhl, on two counts of willfully filing false corporate income tax returns for the years 1971 and 1972, in violation of 26 U.S.C. § 7206. On February 7, 1979, the district court (Judge James R. Miller, Jr.) entered a judgment of acquittal as to both defendants on the false filing charges covering 1971 and 1972. The grand jury has not been discharged. However, Petitioner has no knowledge of whether the government is currently presenting evidence to the grand jury for the later years.

ARGUMENT

1. The Government has either ignored or misunderstood Petitioner's principal arguments. The mandamus proceeding was not directed, as the Government suggests, at preventing the IRS from misusing grand jury information in a civil proceeding. Rather it was aimed at compelling the District Court to hold an evidentiary hearing on charges of grand jury abuse by the IRS. Therefore the Government's contention that Petitioner has alternative remedies has no relevance in this case.[1] The cases relied on by the Government all involve mandamus actions brought to obtain evidentiary benefits for the moving parties. In such cases, it was appropriate for the Courts to consider whether the

[1] As demonstrated in the petition, the remedies suggested by the government are also illusory in this case (Pet. 33-34).

Petitioner had another remedy to achieve the same benefits besides the extraordinary remedy of Mandamus.

But what alternative remedy is there to an evidentiary hearing on whether the integrity of the grand jury has been violated? The District Court in the instant case had a primary duty to protect the grand jury process. Its failure to make an inquiry on the basis of Petitioner's showing that the integrity of the grand jury was threatened amounted "to little less than an abdication of the judicial function . . . ." clearly justifying the remedy of mandamus. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Under such circumstances the language of this Court's opinions, in *Schlagenhauf* and *LaBuy* does not permit a federal court to avoid the performance of its duty by pointing to possible alternative remedies for the Petitioner.

2. The government's attempt to minimize Petitioner's showing of probable grand jury abuse overlooks Petitioner's identification of specific IRS grand jury practices applicable to this case (Pet. 30-31) which are similar to ones found by the Department of Justice to be improper and ostensibly withdrawn by the IRS (Pet. 29-30). Also, the government ignores the plain meaning of the provisions of Internal Revenue Manual Supplement 9G-85, (Pet. 19-27; Pet. App. 2a) put into effect by the IRS during the pendency of the instant grand jury investigation and not disclosed by the government to Petitioner's counsel or the Court below. It is Petitioner's position that a fair reading of MS 9G-85 clearly reveals that the IRS has instituted procedures to permit it to effectively control grand jury investigations in criminal tax matters.

Petitioner submits that the IRS has adopted this grand jury strategy as a result of an erroneous

interpretation of this Court's newly revised Federal Rule of Criminal Procedure 6(e). This Court sponsored the revision of Rule 6(e) to make it clear that an attorney for the government can disclose grand jury information to an IRS agent chosen by him to assist him in the grand jury investigation to enforce federal criminal law and for no other purpose. The IRS, however, has read the revision to permit it now to supervise and participate in grand jury investigations as an institution.

Petitioner's complaint that the IRS is effectively running many grand jury investigations is not speculative. It can reasonably be presumed that IRS personnel do follow Internal Revenue Manual directives. It does not suffice for the government to cite the language of statutory provisions and federal rules (Govt. Br. 9) restricting control over grand jury investigations and prosecution decisions to the Department of Justice. When the Department of Justice acquiesces in the implementation of the IRS Manual procedures in a grand jury investigation it has improperly delegated effective control over the investigation to the IRS.

3. The government has also misunderstood the petitioner's argument under *United States v. LaSalle National Bank,* 437 U.S. 298 (1978). The point is simply that this Court held in *LaSalle* that the IRS cannot try its own prosecutions and must cease utilizing its investigative process, even for the civil side of the case, once it has referred the matter to the Department of Justice. The reason for this rule, the Court said, was to prevent the IRS from interfering with or augmenting the grand jury's investigation.

Petitioner contends that the present strategy of the IRS under MS 9G-85 is aimed at allowing the IRS to do exactly what this Court said it cannot do in *LaSalle.* The IRS is seeking as an institution under MS 9G-85 to

continue its investigation of a taxpayer after it has referred the case to the Department of Justice for a grand jury investigation. And although it is not using its own administrative summons process, the IRS is able through the grand jury's subpoena power, to question grand jury witnesses and examine grand jury documents in pursuit of its investigative purposes. It is submitted that this practice not only nullifies this Court's ruling in *LaSalle* but it represents an even greater invasion of the grand jury's functions.

Under this analysis, the *LaSalle* issue is raised only when the provisions of MS 9G-85 are implemented, and not when IRS agents simply give technical assistance to an attorney for the government in a grand jury investigation. In the latter case, the attorney for the government and not the IRS is running the investigation. However, under MS 9G-85 the IRS has conditioned the providing of technical assistance to attorneys for the government on the requirement that IRS supervisory and management personnel be included in the IRS grand jury team and that reports of grand jury information be made up the line to the District Director and Regional Counsel to permit the making of IRS prosecution decisions. In essence, the attorney for the government has the IRS, itself, as a partner in the investigation — not simply a few agents to give technical aide.

It is true, as the government states, that MS 9G-85 admonishes all the supervisory and top IRS officials permitted to receive grand jury information not to reveal this information to their colleagues at the IRS for civil purposes and to set up protective files. However, this Court held in *LaSalle* that the criminal and civil functions of the IRS are so intertwined that information barriers of this kind can not be expected to work. For this reason, this Court did not even permit the IRS to

continue its civil investigation once it had transferred its case to the Department of Justice.

4. Finally, the government has sought to dissuade this Court from granting certiorari in this case by erroneously conjuring up the threat of mini trials and the invasion of grand jury secrecy. These arguments are patently irrelevant in this case. This Court's opinions in *United States v. Calandra*, 414 U.S. 338 (1974), and *United States v. Dionisio*, 410 U.S. 1 (1973), frowning on the disruption of grand jury proceedings by mini trials, referred to the litigation of witness objections to grand jury evidence. These cases were never intended by this Court to discourage hearings on challenges to the very legitimacy of grand jury proceedings, as in the instant case. Also, the holding of an evidentiary hearing in this case would not disrupt the grand jury investigation or threaten to invade the secrecy of the grand jury. As Petitioner has emphasized in its petition to this Court, the inquiry at the evidentiary hearing would not be addressed to matters coming before the grand jury, but to how the grand jury investigation was initiated and who is supervising it. Such an inquiry can be made while the grand jury investigation continues, without interruption, and does not call for the revelation of any grand jury material that is protected by secrecy. The fact is that during the entire time these issues have been litigated in the courts below and on this Petition, the work of the grand jury has not been interrupted because of these proceedings.

Because the integrity of the judicial process is threatened by the grand jury abuse present here and because this Court's newly revised Federal Rule of Criminal Procedure 6(e) has been misinterpreted by the Department of Justice, the IRS, and the Courts below, it is imperative that this Court exercise its supervisory power to protect the grand jury process and to clarify the meaning of Rule 6(e).

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 20th day of March, 1979, three copies of the foregoing Petitioner's Reply to Respondent's Brief in Opposition were mailed, postage prepaid, to Hon. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

Samuel Dash